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In the Supreme Court
OF THE
United States

October Term 1928.

No. 7

THE ANN ARBOR RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION and THE CALIFORNIA GROWERS' & SHIPPERS' PROTECTIVE LEAGUE,

Appellees.

BRIEF OF APPELLANTS.

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NOTE: Opinions were delivered in the court below but have not been reported in the official reports.

In the Supreme Court
OF THE
United States

October Term 1928.

No. 273

THE ANN ARBOR RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION and THE CALIFORNIA GROWERS' & SHIPPERS' PROTECTIVE LEAGUE,

Appellees.

BRIEF OF APPELLANTS.

This is an appeal from a decree of the United States District Court for the Northern District of California

(NOTE: All references thus (R. .....) are to pages of the Transcript of Record.)
(All italics are ours.)

[constituted as provided in the Urgent Deficiencies Act of Oct. 22, 1913 (38 Stats. 219)], which dismissed a bill filed in behalf of more than four hundred carriers to annul an order of the Interstate Commerce Commission. The order complained of reduced the rates for the carriage of fresh deciduous fruits from California to Eastern points (129 I. C. C. 25; 132 I. C. C. 582).

The aggregate revenue accruing to the carriers from this traffic exceeded $36,000,000 per annum under the old rates. The reduced rates ordered by the Commission will decrease the revenue of the carriers by an amount in excess of $2,700,000 per annum based upon the 1926 traffic, and will, they claim, cause the traffic to be handled not only without profit, but at an actual loss, beyond the cost of carriage in excess of $240,000 per annum. (R. 14)

The carriers contend that the Commission in reducing the rate, based its action upon a supposed mandate found in certain language of the Hoch-Smith Resolution (43 Stats. 801) directing that "In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation

service". The carriers further contend that in so acting, the Commission misconstrued and misapplied the said Resolution, that it disregarded several provisions of the Interstate Commerce Act, and that, as a result it fixed a rate that is unlawful and confiscatory. They also contend that the practical construction which the Commission has given to the Hoch-Smith Resolution, in its application to the present case, would render the Resolution unconstitutional.

This case does not turn upon conflicting evidence or disputed questions of fact. The issues are legal rather than factual. The report of the Commission itself furnishes sufficient information to show that the Commission erred in its interpretation and application of the law and that its order is invalid.

THE FACTS.

The California deciduous fruit industry.

California produces and ships the bulk of the fresh deciduous fruits produced and shipped in the United States. The principal fruits, excluding apples which are not involved here, are grapes, peaches, pears, plums, apricots and cherries. By far the most important are grapes. Of these, California, in 1926, shipped 81% of the total carload shipments in the country (R. 19). Most of the remainder are produced in New York, Michigan and Pennsylvania (Exhibit No. 18, R. 218).

Deciduous fruits are produced throughout the entire State of California. Not only is the production of these fruits one of the most important agricultural activities in California, but their transportation from California to the East constitutes one of the most important items of railway traffic. Shipments of deciduous fruit constitute the largest single item of transcontinental tonnage, as well as the greater portion of the transcontinental perishable traffic (R. 18, 19). The aggregate revenue of the carriers derived from this traffic exceeds $36,000,000 annually, and constitutes a substantial portion of the entire freight revenue of those carriers which handle the bulk of the traffic. 6.2% of the entire freight revenue of the Southern Pacific accrues from the transportation of deciduous fruits (R. 425).

In 1926, 1,053,755 tons of fresh deciduous fruits were shipped from California to Eastern points under the rates here in question. This tonnage moved in 75,083 cars and included 58,334 cars of grapes, 9,523 cars of pears, 4,741 cars of plums, and 1,093 cars of peaches (R. 19).

How the traffic is assembled and moved.

The deciduous fruit traffic originates at hundreds of shipping points scattered throughout the State of California. 17½% originates on short line railroads and over 51% on branch lines (R. 19). Empty cars are distributed to the loading points during the night, are loaded during the day, and are then picked up

and taken to concentration points. The highly perishable nature of this traffic requires the utmost expedition in loading and assembling the cars.

The concentration points are Roseville and Colton on the Southern Pacific, Bakersfield on the Santa Fe, Sacramento on the Western Pacific, and San Bernardino on the Union Pacific System. At these points the cars are assembled into through trains for movement over the four railroads named and their connecting carriers to Eastern points (R. 285).

Almost the entire traffic moves to destinations beyond the Mississippi River and North of the Ohio River. The extent of the traffic is indicated by the fact that more than 450 carriers were named as defendants in the proceeding before the Commission, and are adversely affected by the reduction in rates. Almost every railroad in the United States participates to some extent in the carriage of California fruit (R. 20).

Unusual characteristics of the traffic.

The deciduous fruit traffic has many characteristics which distinguish it from ordinary traffic.

1. It is seasonal in character. Movement in substantial quantities begins in June and ends in November, but the peak of the movement is in September and October. In 1925 more than 70% of the annual traffic moved in these two months (Exhibit 52, folio 389).

2. All these fruits move in refrigerator cars, a special type of equipment more expensive than any other in freight service with the exception of tank cars, their cost being about 60% more than box cars. They are proportionately more expensive to maintain and operate (R. 45), and are heavier and hence more expensive to haul than any other type of freight car. Thousands of such cars are owned and maintained by the carriers primarily to accommodate this traffic, and although such cars are used wherever possible in other service, many of them remain idle throughout the entire year except in the fruit season.

3. Deciduous fruit, by reason of its perishable nature, is moved with unusual dispatch. A 154-hour schedule is in effect from California points to Chicago as compared with the ordinary schedule for other traffic of 180 hours or longer (R. 44).

4. There is a high percentage of empty haul. The type of equipment used and the demands of the fruit industry prevent the general use of these cars for other purposes. The loaded movement is almost exclusively eastbound and the necessity for securing prompt return of the cars to California and their relative unsuitability for other traffic, results in a large percentage of empty movement. In 1926 the empty haul of refrigerator cars was 67.58% of the total loaded haul both eastbound and westbound, and over 80% of the cars moving eastward under load were returned empty to California (R. 45).

5. The heavy weight of the refrigerator cars results in a disproportionate weight of equipment to the weight of the paying load. In 1926 the paying load in the case of these deciduous fruits was but 34.9% of the gross weight hauled as compared with 50 to 60% for most commodities (R. 45).

6. Loss and damage claims are higher on deciduous fruits than on other traffic because of the perishable nature of the commodity. In 1926 claims payments made by four originating trunk lines and their short line connections for loss and damage on deciduous fruit shipments amounted to 2.77% of the total revenue from this traffic (R. 46), as compared with claim payments on all traffic by the Santa Fe of 1 per cent of the total freight revenue (R. 307).

7. Special terminal service accorded to deciduous fruit traffic in the larger cities, increases the carrier's costs. For example, the rentals alone for the Duane Street Pier of the Erie Railroad in New York used for this traffic amounts to $3.22 per car handled (R. 47).

8. There are numerous diversions and reconsignments of shipments en route. In 1926 75% of the deciduous fruit cars moved over the Santa Fe were diverted one or more times. In 1926 the average diversions per car were 1.07 (R. 47). No charge is made for diversions west of Chicago. These diversions result in breaking up the trains and reallocation

of cars at almost every division point west of Chicago, thus destroying the advantage of trainload movement.

9. The fruit is shipped in most instances before it is sold. Approximately 80% is sold after arrival in the East, only about 20% being sold before shipment (R. 187). The usual practice is for the shipper to start his cars eastward without a definite destination, diverting and reconsigning the cars en route to various possible markets, eventually sending them to the markets which seem to offer the best opportunity of securing maximum prices.

Increase in the Production and Shipment of Deciduous Fruit.

There has been a remarkably rapid and consistent growth in the volume of deciduous fruits shipped from California to the East. There has also been a rapid increase in the acreage devoted to the production of deciduous fruits. In 1905, 6,326 carloads of deciduous fruits were shipped out of the state. A continuous and unprecedented increase culminated in the transportation of 86,795 carloads in the year 1925 and 78,803 carloads in the year 1926. The shipment in 1926 represented an increase of more than 1200% over the volume in 1905. Carload shipments by years are as follows (R. 223):

Year	*Total*	*Grapes*
1905	6,326	1,602
1906	5,557	2,052
1907	6,459	3,460

1908	10,719	3,819
1909	13,122	5,880
1910	11,936	4,948
1911	12,539	6,374
1912	13,344	6,357
1913	13,332	6,363
1914	16,146	8,773
1915	16,778	9,563
1916	17,891	9,722
1917	24,628	13,944
1918	27,417	16,358
1919	29,971	19,228
1920	35,246	24,152
1921	40,209	28,419
1922	53,961	41,463
1923	69,777	52,339
1924	66,786	54,775
1925	86,795	71,155
1926	78,803	60,786

The record shows by affidavit (R. 104) that, in 1927, 89,835 carloads of deciduous fruits moved from California to interstate points, of which 72,330 carloads consisted of fresh grapes.

Grapes make up the bulk of the movement, and there has been a much greater increase proportionately in the shipment of grapes than of other fruits. In 1905, grapes constituted 25% of the total movement, in 1910, more than 40%, in 1920, almost 70%, and in 1926, more than 75% of the total. While the movement of deciduous fruits, other than grapes, increased 381% between 1905 and 1926, the movement

of grapes increased 3794% (R. 223). The number of acres in grapes increased from 434,907 acres in 1923 to 635,236 acres in 1926, an increase of 46% in three years (R. 64).

The production of pears, plums and grapes in California increased in the two year period from 1924 to 1926, as follows (R. 25):

Pears increased 62%;

Plums increased 82%;

Grapes increased 33-1/3%.

The annual increase in the production of deciduous fruits in the past three or four years has averaged about 12% per annum (R. 188). The present acreage planted in California to deciduous fruits is 680,000 acres, of which 30,000 acres are planted but not yet in bearing (R. 490). The great increase in the volume of grapes shipped has been due principally to the increase in the volume of so-called juice grapes —that is, grapes which are used for juice purposes, as distinguished from table purposes. The shipment of grapes for juice purposes, a negligible factor prior to the enactment of the prohibition law, has increased until, in 1926, it amounted to more than six hundred thousand tons requiring more than 40,000 cars. About 70% of all the grapes shipped are juice grapes (R. 19) and juice grapes constitute approximately 54% of the total deciduous fruit movement.

The depression in the California deciduous fruit industry.

The complainants before the Commission alleged that there was a depression in the California deciduous fruit industry and this depression had existed for five years. But it was found by the Commission, that the depression does not extend throughout the entire industry, and that the prices of peaches and apricots have materially improved (R. 25). The depression is particularly noticeable in the grape industry (R. 21, 22).

The Commission found the average price received in Eastern markets for California deciduous fruits for each year since 1917, to be as follows (R. 23):

	Average price per 100 pounds.		*Average price per 100 pounds.*
Year 1917	$5.43	Year 1922	$6.74
Year 1918	6.93	Year 1923	6.19
Year 1919	7.99	Year 1924	6.58
Year 1920	9.97	Year 1925	5.60
Year 1921	7.82	Year 1926	5.62

Practically all of the deciduous fruits shipped to the East are sold on a delivered basis (R. 49). Fluctuations in the market prices during the season sometimes equal or exceed the freight rate (R. 24). In some instances during the last few years grapes have not been picked but have been left on the vines.

Rates.

The rates for the transportation of deciduous fruits from California to the East are blanket rates. The

country between the Rocky Mountains and the Atlantic Seaboard is divided geographically into several large groups designated by the letters A to M. Group J is the most westerly group, and includes the territory in the vicinity of Denver and Cheyenne. The blanket rate covers all movement to these groups with the exception of Group J, where a somewhat lower rate is applicable, that is to say, all cars of deciduous fruit shipped to any point east of the Denver area, regardless of their destination, are transported at the same rate. The rate upon a car of fruit shipped to New York, Boston or Atlanta is the same as that upon a car shipped to Omaha, St. Louis or Chicago. The weighted average haul of all deciduous fruits in 1926, including those transported to Group J, was 2,970 miles, showing the predominance of the movement to the most easterly part of the blanket territory close to the Atlantic Coast (R. 20). The movement to Group J is relatively small, amounting in 1926 to but 627 cars out of the 74,456 cars moving in that year, or about 3/4ths of 1% of the whole (R. 19).

All parties to the proceeding before the Commission conceded that the blanket arrangement was desirable and that the traffic might be considered by its average characteristics, the small percentage moving to Group J not materially affecting these averages (R. 29).

The rates, reduction of which was ordered by the Commission, were $1.73 per 100 pounds to Groups A to M (excepting J), and $1.62 to Group J. Rates

had fluctuated to various levels prior to 1911, but in that year were voluntarily reduced by the carriers to their lowest level, $1.15 per 100 pounds. This was accompanied by an extension of the rates then applicable to the most westerly groups, to the eastern groups and resulted in the blanket rate which has since remained in effect. On June 25, 1918, the Director General of Railroads increased the rates to all groups to $1.44 per 100 pounds. Under the general increases authorized by the Commission on August 26, 1920, the rates were increased to $1.92 per 100 pounds, except to Group J, where the rate became $1.80. On January 1, 1922, by voluntary action of the carriers, the rates were reduced to $1.73 to Groups A to M, and $1.60 to Group J, which rates remained in effect until reduced by the order of the Commission, which is complained of here (R. 28). By this last mentioned order the rates were reduced, effective February 10, 1928, as follows (R. 7):

(a) The $1.73 rate was reduced to $1.60, a reduction of 13¢ per 100 pounds;

(b) The $1.62 rate was reduced to $1.50, a reduction of 12¢ per 100 pounds.

In connection with the new rate, the carriers were authorized to increase the carload minimum on grapes from 26,000 to 30,000 pounds, but no increased minimum was authorized as to other deciduous fruits (R. 59).

The rates thus ordered to be reduced had been in effect since January 1, 1922, a period of six years, and more than 400,000 cars had moved under them.

In their petition the carriers allege that the decrease in rates will result in an annual decrease in revenues of more than $2,700,000; and an annual loss in excess of $240,000, this being the difference between the cost of the traffic to the carriers and the receipts from the traffic (R. 14). The refrigeration charge is not in question here, the only rates involved being those covering freight transportation.

Proceedings before the Commission and in court.

The earlier proceeding before the Commission.

The California Growers' & Shippers' Protective League is an association of growers and shippers of deciduous fruits, having its office at San Francisco. It was the complainant before the Commission in the proceeding in which the order of the Commission here complained of was made. It had also been the complainant in an earlier proceeding against the same carriers, challenging the same rates, which had been decided in favor of the carriers. The earlier proceeding was initiated on August 31, 1923, when the Association filed a complaint (Docket No. 15137) alleging that the deciduous fruit rates were unreasonable and unduly prejudicial, in violation of Sections 1 and 3 of the Interstate Commerce Act (R. 282). After hearing, the Commission, on June 25,

1925, dismissed the complaint, finding that the rates were not unreasonable or unduly prejudicial, and that the traffic was then freely moving in interstate commerce. The report of the Commission (100 I. C. C. 79) is printed on page 281 of the Record.

The Hoch-Smith Resolution had been adopted by Congress prior to the argument in the earlier proceeding and was considered by the Commission in its opinion and disposition of the case in 1925. In its report, the Commission said (R. 315):

> "We have given consideration to the matters mentioned in the resolution."

The Commission, in its report, found further (R. 316):

> "The record in this case shows affirmatively that the deciduous fruits here under consideration are moving freely under the present rates, and that the volume of movement has increased greatly during recent years."

After mentioning the unfavorable financial return to the producers, the report continues (R. 316):

> "But this record does not justify the conclusion either that this condition is likely to continue or that it is due in great part to the rate structure. It is suggested in the record that the unfavorable financial results are chargeable in large measure to overproduction, to inability of the eastern market to absorb the supply. If this is so, economic laws, and not the rate adjustment, will sooner

or later bring about a reduction in the movement, and such reduction would be desirable."

The report then concludes (R. 317):

"* * * Considering the rates assailed as a whole, it does not appear that they are unreasonable. On the other hand, the comparisons with the rates from the Northwest and other producing sections indicate that the rates in issue are reasonable.

"We find that the rates assailed as a whole are not unreasonable or unduly prejudicial as alleged. This finding is without prejudice to any conclusion which may be reached upon the later and more comprehensive record concerning the relation of railroad rates to agriculture which is expected to be developed in Docket No. 17000.*

"An order will be entered dismissing the complaint."

An application for reconsideration filed by the complainant was denied by the full Commission on March 2, 1926.

The present proceeding before the Commission.

Less than ten months after the termination of the first proceeding, the same complainant, California Growers' & Shippers' Protective League on December 20, 1926, filed a new complaint with the Commission (R. 139) repeating the allegations of unreasonable-

*Docket 17000 referred to is the general rate investigation initiated by the Commission on its own motion for the purpose of giving effect to the Hoch-Smith Resolution. It is hereafter referred to and is not to be confused with the later proceeding before the Commission, instituted by the California Growers' & Shippers' Protective League, in which the order here complained of was made.

ness and undue prejudice contained in its former complaint, and further specially alleging that the rates were higher than the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and were in violation of the Hoch-Smith Resolution. This is the proceeding in which the order here complained of was made.

Various parties intervened, some favoring and others opposing the complaint. The Department of Agriculture and Markets of the State of New York (R. 148), the Department of Agriculture of Pennsylvania (R. 156), and the Department of Agriculture of Michigan (R. 161) intervened in opposition to the complaint. They alleged in substance that deciduous fruits, principally grapes, produced in those states, were being marketed in active competition with the California products, that the producers were now suffering from a depression, that they were faced with the loss to California producers of their natural markets, and that any reduction in the California rates would greatly aggravate the seriousness of their situation. The Arkansas Railroad Commission and the Ozark Fruit Growers Association also intervened alleging that Arkansas growers market their products in the same destination territory as the California products and that any reduction in the rates on California fruits would jeopardize the interests of growers and shippers of deciduous fruits in Arkansas unless a similar reduction was made in the rates for Arkansas products (R. 154).

After hearing, the Commission, on July 20, 1927, made its report and order (R. 16) prescribing the reduction in rates now in question. The ultimate finding of the Commission was (R. 59):

> "We are of the opinion and find upon a consideration of the whole record that the rate of $1.73 as applied to the transcontinental shipment of deciduous fruits from California to Groups A to M, inclusive, except Group J is, and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.60; and that the rate of $1.62 currently applicable to Group J points is, and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.50 and that such rates are the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and are necessary to promote the freedom of movement by defendants of the specified products of agriculture, now affected by existing depression in agriculture. In publishing these rates defendants may increase the carload minimum on grapes to 30,000 pounds."

It is the order entered upon this finding which the carriers here seek to annul.

The carriers immediately petitioned the Commission for reconsideration. On November 14, 1927, the Commission reaffirmed its previous order and made a Report on Further Consideration (R. 65).

This report concluded with the following words (R. 68):

> "On the whole record, we adhere to our former finding that the present rates are unreasonable

> and we are not convinced that the rates prescribed are below what are necessary to afford complainants the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

In the Report on Further Consideration, Commissioner Eastman who had filed a separate concurring opinion to the original report filed a dissenting opinion, in which he said (R. 68):

> "When this case was first decided, I was, as I then indicated in a concurring expression, by no means clear that the rates attacked were unreasonable, but gave complainant the benefit of the doubt because of the Hoch-Smith Resolution. The further consideration which I have since given the case leads me to agree substantially with Commissioner McManamy, who has dissented."

Commissioner McManamy also dissented.

The Proceeding in the District Court.

On November 23, 1927, the carriers affected by the order filed their petition and bill for injunction in the United States District Court, for the Northern District of California, praying that the order be annulled and further praying that the Court issue a temporary injunction restraining the execution of the order, pending final hearing on the bill (R. 1). Answers were filed by the United States (R. 75), by the Interstate Commerce Commission (R. 79), and by the California Growers' & Shippers' Protective League,

the complainant before the Commission (R. 83), which was permitted to intervene (R. 75).

The application for the temporary injunction was heard by Rudkin, Circuit Judge, and Kerrigan and St. Sure, District Judges, who, on January 18, 1928, entered an order denying the application for a temporary injunction (R. 101). At the same time they filed a memorandum opinion (R. 99), as follows:*

> "Before Rudkin, Circuit Judge; Kerrigan and St. Sure, District Judges.
>
> "The Interstate Commerce Commission reduced the rate on trancontinental shipments of deciduous fruits from California to certain eastern points from $1.73 to $1.60, and to certain other eastern points from $1.62 to $1.50 per one hundred pounds. The present suit was instituted by the large number of railroads affected by the reduction to set aside the order of the Commission and to suspend its operation during the pendency of the suit. The application for a temporary injunction is based largely on the testimony taken before the Commission and on the report made by the Commission. We have given careful consideration to the record and to the exhaustive arguments submitted on the application for the temporary injunction, and will content ourselves at this time with a mere statement of our conclusions. First, the contention that the reduced (fol. 111) rate will compel the carriers to transport this class of freight at a loss, or without substantial reward, is without support in the record. Second, the contention that the carriers are entitled to receive what would be deemed a

*Neither the opinion of the court denying the application for a temporary injunction or its opinion dismissing the bill have been printed in the official reports.

fair return on this class of freight, independently of their other business, and independently of any other consideration, is unfounded in law. 'The legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges and it is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business. There are many factors to be considered,—differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications. Nor is its authority hampered by the necessity of establishing such minute distinctions that the effective exercise of the rate-making power becomes impossible. It is not bound to prescribe separate rates for every individual service performed, but it may group services by fixing rates for classes of traffic. As repeatedly observed, we do not sit as a revisory board to substitute our judgment for that of the legislature, or its administrative agent, as to matters within its province. * * * The court, therefore, is not called upon to concern itself with mere details of a schedule; or review a particular tariff or schedule which yields substantial compensation for the services it embraces, when the profitableness of the intrastate business as a whole is not involved.' Nor. Pac. Ry. v. North Dakota, 236 U. S. 585-98. Third, the Commission was authorized to reduce rates on the products of agriculture before completing the thorough (fol. 112) investigation of the rate structure of common carriers, subject to the Interstate Commerce Act, as directed by the joint resolution of January 30, 1925, 43 Stat. 801, and did not otherwise misconstrue the terms of that resolution which are in a large measure directory. The application for a temporary injunction is therefore denied."

The showing on the application for a temporary injunction consisted of the record before the Commission and affidavits indicating the movement of deciduous fruits under the rates in question.

On May 2, 1928, the case was submitted on its merits on the same record. On May 9, 1928, the Court entered its decree dismissing the bill for want of equity and denying an application for a stay pending an application to the Supreme Court of the United States for a stay pending appeal (R. 107). In dismissing the bill the Court filed a memorandum, reading as follows (R. 105):

> "Before Rudkin, Circuit Judge, Kerrigan and St. Sure, District Judges
>
> "This case has been submitted to us on final hearing upon the record before us on the hearing of the application for a temporary injunction. On the first hearing we disposed of the application rather summarily, stating our conclusions in general terms, expecting at that time to review the testimony at greater length on the final hearing and to make more specific findings on the material issues in the case, or to accomplish the same result through a reference to a Special Master. But the desire of the plaintiffs to apply to the Supreme Court during its present term for a stay pending the appeal, in the event that such a stay is refused by this Court, precludes us from carrying out our original design. However, we are informed that the parties have condensed the record before us on the former hearing so as to bring it within reasonable limits and there is not the same necessity for specific findings that might otherwise exist. To the end, therefore, that the

plaintiffs may make timely application to the Supreme Court for the stay of proceedings as requested by them, we content (fol. 122) ourselves with dismissing the bill of complaint for the reasons stated in our former opinion, and the application for a stay of proceedings pending the appeal is denied. Let a decree be entered accordingly."

The carriers immediately appealed to the United States Supreme Court from the final decree dismissing the bill, and an order allowing the appeal was entered on May 10, 1928 (R. 126). On May 21, 1928, the carriers applied to this Court for a stay pending appeal, but this application was denied on May 28, 1928.

The Hoch-Smith Resolution.

The Hoch-Smith Resolution (43 Stat. 801) which forms the basis of the order of the Commission, is a joint resolution of the Senate and House, and was approved by the President on January 30, 1925.

It reads as follows:

"Chap. 120.—Joint Resolution Directing the Interstate Commerce Commission to take action relative to adjustments in the rate structure of common carriers subject to the Interstate Commerce Act, and the fixing of rates and charges.

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in

adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

"That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantages as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the Commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the Commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the Commission.

"In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided,* That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the Commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution."

Approved, January 30, 1925.

43 *U. S. Statutes at Large,* page 801;
Public Laws, 68th Congress, Session II, Chapter 120.

Specification of assigned errors intended to be urged and summary of points upon which the carriers rely to show that the order is invalid.

The carriers contend:

1. The order is based on the Hoch-Smith Resolution which was misconstrued and misapplied by the Commission. The Commission construed the Resolution as requiring it to reduce an existing rate on agricultural products, notwithstanding that the existing rate was reasonable, and otherwise lawful. This was a misconstruction of the Resolution. The Resolution required that the Commission reduce existing

rates on agricultural products only if such rates were found to be unreasonable or discriminatory, or otherwise unlawful as measured by the provisions of the Interstate Commerce Act.

Assignment of Error No. X (R. 112) specifies the error of the lower court in making the decree and dismissing the petition, upon the ground that the Commission found that the old rates were reasonable and not unduly prejudicial. See also Assignments of Error Nos. IX, XI and XII (R. 111, 112).

2. If the Resolution, properly construed, authorizes the Commission to reduce existing reasonable rates, such reduction is only authorized where it is "compatible with the maintenance of adequate transportation service". The Commission has interpreted this to mean that a reasonable rate may be reduced, although the carriers are not earning the fair return specified pursuant to Section 15a of the Interstate Commerce Act. This is in effect to repeal Section 15a, and is an improper interpretation of the Resolution. If the Resolution authorizes the Commission to reduce a reasonable rate where the carriers are not earning a fair return, it also requires that other rates be adjusted simultaneously so that the carriers' revenue, already inadequate, will not be impaired further.

Assignment of Error No. XLII (R. 122) specifies the error of the lower court in making the decree and dismissing the petition, upon the ground that the Commission reduced reasonable rates of the carriers, depriving them of compen-

sation and return to which they are entitled pursuant to the provisions of Section 15a of the Interstate Commerce Act, notwithstanding the fact that the carriers were not making the fair return provided for under Section 15a of the Interstate Commerce Act. See also Assignments of Error No. XXIX (R. 118) and Nos. XLI and XLV (R. 122, 123).

3. The Commission erroneously construed the provision of the Resolution respecting "freedom of movement by common carriers of the products of agriculture affected by that depression" to mean that notwithstanding a long, steady and "enormous increase in the tonnage of such fruits" moving in interstate commerce, freedom of movement did not exist unless the shippers were making a profit.

Assignment of Error No. XXV (R. 116) specifies the error of the lower court in making the decree and dismissing the petition, upon the ground that the Commission construed the Resolution and the law to authorize a reduction of the reasonable rates of the carriers to permit freedom of movement by common carriers of the products of agriculture affected by depression if the shippers involved are not making a profit, notwithstanding the movement of a large and increasing volume of traffic in the industry. See also Assignments of Error Nos. XXIV (R. 116) and XXXVI (R. 129).

4. The Commission erroneously construed the Resolution as authorizing it to find without substantial evidence that the existing rate was unreasonable, and that the new rate was the lowest possible lawful

rate, and further misconstrued the Resolution as placing upon the carriers the burden of proving that the old rate was the lowest possible lawful rate and that the new rate was lower than the lowest possible lawful rate. The order is arbitrary and invalid since the Resolution does not authorize the Commission to act without substantial evidence and does not alter the existing rule requiring the complainant to bear the burden of proof.

Assignments of Error Nos. XLVII and XLVIII (R. 124) specify the error of the lower court in making the decree and dismissing the petition, upon the ground that, in the proceeding before the Commission, the Commission imposed upon the carriers the burden of establishing that the old rates were reasonable and that the new rates were not the lowest possible lawful rates compatible with the maintenance of adequate transportation service.

5. The Commission misconstrued the Resolution in that it held that a rate which yielded the carrier an amount but slightly above operating expenses was a lawful rate. The Interstate Commerce Act and the Constitution require that each rate shall yield to the carriers all proper costs and a substantial profit.

Assignment of Error No. XXXIII (R. 119) specifies the error of the lower court in making the decree and dismissing the petition, upon the ground that the Commission fixed new rates slightly above the operating expenses of the carriers which do not afford substantial compensation to the carriers. See also Assignments of Error Nos. XXXIV and XXXVII (R. 120, 121).

6. The Commission construed the Resolution as authorizing it to regulate industry through the medium of regulating rates, and to base rates not upon the approved and accepted principles of rate making but upon whether the shipper was or was not conducting his business at a profit. Such is not a proper construction of the Resolution, but if it is, the Resolution is unconstitutional as it then constitutes a regulation of industry and not a regulation of commerce.

Assignment if Error No. XLIX (R. 124) specifies the error of the lower court in making the decree and dismissing the petition, upon the ground that the Commission based its finding that rates higher than the new rates would not be unreasonable, taking into consideration the cost and value of the service and the right of the carriers to earn a reasonable rate, but would not be unreasonable because of the existence of a depression in the business of certain shippers, the inability of the shippers to realize a profit from their shipments and the relatively prosperous financial condition of the carriers. Assignment of Error No. LI (R. 125) specifies the erroneous construction of the Resolution by the Commission as empowering it to fix rates for the purpose of regulating industrial conditions, and that the Resolution so construed is beyond the constitutional power of Congress. See also Assignments of Error Nos. VIII (R. 111), XIII and XV (R. 113), XXXVIII and XL (R. 121), XLVI (R. 123) and LII (R. 125).

7. The Commission misconstrued the Resolution in that it applied it in an isolated proceeding involving a rate on a particular commodity from a single

state, whereas it was intended to be applied only in a general rate proceeding.

> Assignment of Error No. XVIII (R. 114) specifies the error of the lower court in making the decree and dismissing the petition, upon the ground that the Commission applied supposed instructions contained in the Resolution in a proceeding which was not a general or thorough investigation of the general rate structure of the carriers. See also Assignments of Error Nos. XVII and XIX (R. 114).

8. The rate fixed is confiscatory and violates the Act and the Constitution. The Commission intended to fix a rate that would not yield a substantial profit and did in fact fix a rate which does not cover the carriers' costs or yield a substantial return.

> Assignment of Error No. II (R. 110) specifies the error of the lower court in making the decree and dismissing the petition, upon the ground that the new rates deprive, and will deprive, the carriers of their private property for public use, without just compensation, in violation of the Fifth Amendment of the Constitution of the United States. See also Assignments of Error Nos. III, IV, V and VI (R. 110) and XXI and XXII (R. 115).

ARGUMENT.

The order is based upon the Hoch-Smith Resolution.

The order of the Commission reducing the rates followed a written report of the Commission in which it stated the issues, discussed the law applicable, reviewed the evidence and made findings of fact. The

report is referred to in, and made a part of, the order, and is therefore available in determining the foundation of the order, the facts upon which the Commission acted and based its decision, and the interpretation which it placed upon the law which it considered applicable.

An examination of the Report (R. 16) and the Report on Further Consideration (R. 65) makes clear that the order is founded on the Hoch-Smith Resolution, and that the finding in the report (R. 59)——

> "That the rate of $1.73 * * * is, and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.60; * * * and that such rates are the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and are necessary to promote the freedom of movement by defendants of the specified products of agriculture, now affected by existing depression in agriculture."

is not based, and was not intended by the Commission to be based upon the provisions of Section 1 of the Interstate Commerce Act, which require that rates be just and reasonable, but is based upon a supposed mandate contained in the provision of the Resolution:

> "In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with

the maintenance of adequate transportation service:"

This proceeding before the Commission was not the ordinary one to enforce the reduction of an "unreasonable" rate, violating Section 1 of the Act. It was intended, and was considered by the Commission, to be one to enforce "the lowest possible lawful rates compatible with the maintenance of adequate transportation service", enjoined by the Resolution, irrespective of whether the existing rate was reasonable or not. It is submitted therefore that the statement that the existing rate was unreasonable should not be considered as an independent finding that the rate was unreasonable but only as a finding that the old rate was in excess of "the lowest possible lawful rate" enjoined by the Resolution as interpreted by the Commission.

1. Complainant relied upon the Hoch-Smith Resolution.

The Complainant before the Commission attacked the rates as being (R. 146)

"(1) unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act, as amended, and

(2) unduly and unreasonably prejudicial, in violation of Section 3 of said Act, and

(3) higher than the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and upon an unjust and unreasonable basis with relation to other rates, in violation of the joint resolution of Con-

gress (S. J. Res. 107) commonly known and designated as the Hoch-Smith Resolution."

The complaint was filed with the Commission on December 20, 1926, less than ten months after the full Commission had denied a petition for reconsideration in the earlier case where the Commission found the identical rates (R. 317) were "not unreasonable or unduly prejudicial as alleged" (R. 18).

Early in the Report, Commissioner Aitchison states that the Hoch-Smith Resolution is "primarily relied on in the instant case" (R. 18). Further on he says: "While the complaint alleges a violation of Section 3 of the act, no great reliance was placed upon that allegation" (R. 37).

2. The evidence was directed to the Hoch-Smith Resolution.

The evidence introduced before the Commission was directed to the issues suggested by the Resolution. The report of the Commission summarizes this evidence. It points out that the complainant developed at length the trend of agriculture in California, showing that during the past thirty years much land formerly used for other purposes had been diverted to the growing of fruits and vegetables and that, should the growing of deciduous fruits become unprofitable, much of the land would go back to its native state (R. 21).

It is pointed out further that the prices of deciduous fruits had decreased so that transportation charges had become an important item of expense, and "in complainant's view the markets must be brought nearer by means of rate reductions" (R. 22). The farm values for deciduous fruits over a period of years are then reviewed and the Commission finds, "There has been since 1921 a distinct downward trend in the price levels of deciduous fruits in contrast with the upward trend of prices in the citrus-fruit industry, and in contrast with the comparative stability of the vegetable prices" (R. 22). This evidence and these findings are solely responsive to the Resolution. The Commission discussed the showing with reference to the lower prices received for deciduous fruit and states:

> "These prices are shown to us in compliance with the terms of the Hoch-Smith resolution, and to meet the statement in the prior report of our division, that 'the record herein does not show the comparative levels in market value of the various commodities over a reasonable period of years'." (R. 23)

The Commission devotes much attention to the prices received by the shippers and to the condition of the industry. It finds that "While undoubtedly overproduction and distributing practices are factors in the situation, the essential fact still remains that the industry is in serious financial straits" (R. 25) and that "complainant has established that this industry, for the past five years, has been undergoing

a period of deflation and depression, and that the years 1925 and 1926 were more unfavorable than the years preceding."

It states, "In complainant's view the existing depression in California deciduous-fruit industry is precisely such as the Hoch-Smith resolution was designed to assist" (R. 25). Again, it states, "Defendants, on the other hand, claim that if they have justified their present rates under Sections 1 and 3 of the interstate commerce act, nothing either in the Hoch-Smith resolution, or developed of record in the instant case, will provide lawful warrant for us to reduce such rates" (R. 26).

The Commission distinguishes another case, which had been cited in support of the carriers' contention that the rates were reasonable, by pointing out, "Moreover, the case was decided prior to the passage of the Hoch-Smith Resolution" (R. 41), and that "They would not necessarily constitute precedents against the granting of relief if the same rates were assailed with an adequate showing of changed and different conditions of fact, or in the basic law applicable, and do not preclude our conclusion on this record" (R. 41). The statement respecting a change "in the basic law applicable" is indicative of the Commission's view that the Resolution constituted such a change.

The contention of the carriers that a comparison with the rates on California citrus fruits which the Commission considered "at least not too high" (R.

42) showed that the deciduous fruit rates were reasonable and thus could not be reduced, was dismissed by the Commission with the statement, "But it does not follow that the earnings on citrus-fruit traffic will prevent any readjustment of the deciduous-fruit rates if present rates on the latter are not the lowest possible lawful rates compatible with the maintenance of adequate transportation service. Under the Hoch-Smith resolution the relative prosperity of an industry over a period of years may be considered as well as its relative adversity" (R. 42).

The Commission discusses at length the meaning of the expression, "freedom of movement", as used in the Resolution. The contention of the carriers, "that the charges for transportation have nothing to do with the existing economic conditions in the deciduous fruit industry" (R. 48), and that the rapid increase in the quantities shipped indicates that there is "now entire freedom of movement" is contrasted with the view of the shippers that freedom of movement, "as used in the Hoch-Smith Resolution means more than the hauling of an unprecedented volume of traffic". The Commission finds that "the record establishes that producers are sustaining serious financial loss, that their indebtedness is increasing, that they are finding it difficult to meet taxes, that banks are foreclosing or assuming the management of properties, and that land values have been entirely deflated. Under such conditions complainant contends that freedom of movement does not exist" (R. 48).

The Commission considered the effect of the proposed reduction on the industry and found that, "It it impossible to prophesy with assurance what result would flow from a reduction in rates" (R. 49), but that, "Since practically all deciduous fruits are sold on a delivered basis, complainant claims that a reduction in rates will prove of direct benefit to the producer" (R. 49). It also found, "Assuming that the reduced rate would not be reflected in reduced selling prices, the reduction here sought * * * would afford substantial relief to the growers, who bear probably the major portion of the charges directly or indirectly, and would mean the difference between a loss and a small profit to many of them" (R. 49). It is reasonable to conclude that the Commission proceeded to make its order upon this assumption.

Much space is devoted to a discussion of the condition of the carriers and their relative prosperity (R. 49-53), upon which the Commission apparently based its finding that the rates requested would be "compatible with the maintenance of adequate transportation service" as required by the Resolution (R. 56).

3. The Commission based its report and order on the Hoch-Smith Resolution.

The report clearly shows that the order is based upon the Hoch-Smith Resolution. After discussing the evidence introduced at the hearing, the Commis-

sion summarizes the divergent views of the complainant and defendants as follows (R. 25):

> "In complainant's view the existing depression in the California deciduous-fruit industry is precisely such as the Hoch-Smith resolution was designed to assist. It contends that a rate reduction will tend to foster and preserve that industry and that this result will be in the interest of a natural and proper development of the country as a whole. Defendants on the other hand claim that if they have justified their present rates under sections 1 and 3 of the interstate commerce act, nothing either in the Hoch-Smith resolution, or developed of record in the instant case, will provide lawful warrant for us to reduce such rates."

After thus setting forth the contentions of the parties as to the proper interpretation and application of the Resolution, the Commission proceeds itself to discuss and interpret the Resolution. This it does in the following language (R. 26):

> "In two recent cases we have had occasion to discuss the meaning and intent of the Hoch-Smith resolution. In *Grain and Grain Products,* 122 I. C. C. 235, 264, we said:
>
> As aforesaid, the intent of the resolution is that products of agriculture affected by depression shall move at the 'lowest possible lawful rates compatible with the maintenance of adequate transportation service.' It sets no new standard of lawfulness, but provides, in effect, that to the extent that there are flexible limits to our discretion, we shall require the maintenance of the lowest rates falling within those flexible limits. Rates that may lawfully be required must in principle

be high enough to cover all the cost that may fairly be allocated to the service plus at least some margin of profit. *Northern Pacific Ry. v. North Dakota*, 236 U. S., 585; *Norfolk and Western Ry. v. West Virginia*, 236 U. S. 605. But it has always been recognized that the burden of transportation may reasonably be adjusted with some regard to the value of the service, in other words, that the higher grade, more valuable commodities may be required to pay a greater margin of profit than those that are of lower grade and less valuable. The substance of the provision of the resolution quoted above is that agricultural products affected by depression shall in this respect be included in the class of most favored commodities, to such extent, at least, as may be 'compatible with the maintenance of adequate transportation service.'

Subsequently, in connection with similar language in *American Live Stock Asso. v. A. T. & S. F.*, 122 I. C. C. 609, 617, we further said:

In the past we have had occasion to consider at times what may be called 'out-of-pocket' cost, but while it has been contended that the carriers might voluntarily, in certain situations, establish rates covering only such cost, it has never been seriously contended that we could lawfully require this to be done. Rates that we may lawfully require must in principle be high enough to cover all the cost that may be fairly allocated to the service plus at least some margin of profit. * * * We say 'in principle,' because only rarely is definite information available as to such cost, and in practice rates must often be fixed largely by comparison with other rates. Of course, the other sections of the interstate commerce act must also be borne in mind in determining the lowest lawful rates in a particular situation.

The resolution is in effect a direction to us to give agricultural commodities affected by depression the lowest rates that it is possible to give without running counter to the provisions of the interstate commerce act and the carriers' rights under the Constitution. Section 1 of the act requires that all rates shall be just and reasonable. What is a reasonable rate? It may be said to be somewhere between the minimum charge that can be made for the service and permit the carrier to live, and the maximum charge that can be borne by the shipper. In the *Western Advance Rate Case*, 20 I. C. C. 307, pages 347, 348, we said:

What is the reasonable rate that shall be charged to the shipper? The legislature may not make rates so as to confiscate the carrier's property. The carrier, on the other hand, may not make rates which are unjust to those who by economic necessity are compelled to employ its services. Here, then, we have the minimum of legislative power and the maximum of the carrier's power. Between these lies a zone, indefinite and variable. Without question the carrier will tend toward the maximum, while governmental authority will be inclined—in fact has been created—to repress its upward tendency. One moves inevitably upward to the highest rate which the traffic will bear; the other attempts to discover some relation between charge for service and cost of service.

Both the commission and the courts have repeatedly referred to a flexible limit of judgment in reaching a conclusion as to the reasonableness of a rate or a schedule of rates. Otherwise stated, there is a zone of reasonableness within which any rate is just and reasonable to the carrier as well as just, fair, and reasonable to the shipper that utilizes the carrier's services."

This, viewed in the light of the other statements in the report, indicates with considerable exactness just what the Commission considered it was under the duty to do in applying the Resolution, and makes clear also that the Commission based its order solely upon what it deemed to be the proper interpretation and application of the Resolution.

This discussion shows that the Commission considered that the Resolution imposed upon it the duty to fix rates for the carriage of agricultural products suffering from depression at the lowest limit or level within what it called "the zone of reasonableness permitted by the flexible limits of discretion reposed in" it, and "as near the lowest limit or level of that zone as is compatible with the maintenance of adequate transportation service". The Commission deemed itself under the duty to reduce a rate on agricultural products suffering from depression, if that rate, even though reasonable, was higher than the "lowest possible lawful rate", which, as the Commission stated, was a rate slightly in excess of operating expenses. As the order was based upon the supposed mandate of the Resolution, the finding that the old rate was "unreasonable" was not a finding that the old rate was unreasonable, measured by the standards of the Interstate Commerce Act, but only that it was in excess of the "lowest possible lawful rate" enjoined by the Resolution. This is sufficiently established by the portions of the report already noted

and the further statements made by the Commission to which we will now refer.

In the report the Commission finds (R. 56):

> "Complainant has established that the growing of deciduous fruits is one of the great basic industries of California, and that this industry for the past five years has undergone a period of deflation and depression. Its economic situation is such that it clearly comes within the terms of the Hoch-Smith resolution as entitled to the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

This language is solely responsive to the Resolution.

The Commission further finds (R. 56):

> "While all the defendants who handle the bulk of the deciduous fruit traffic have not as yet made the fair return, their present financial condition is relatively strong. It seems clear that the reduction requested, if granted, would not affect the maintenance of adequate transportation service."

This is intended to be responsive to another of the requirements of the Resolution, namely, that the rate to be fixed shall be "compatible with the maintenance of adequate transportation service".

But any doubt that might exist on the question would seem to be dispelled by the statement of the issue in the case by the Commission itself (R. 56):

> "The primary issue to be determined, therefore, is whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness

permitted by the flexible limit of discretion reposed in us."

This is the issue which the Commission itself stated was the "primary issue". It is the issue which the Commission decided. It did not decide or consider any other issue. As framed by the Commission, the issue is not one as to the reasonableness or unreasonableness of the rate, but is "whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us"; whether it was the "lowest possible lawful rate", which was defined by the Commission to be, in principle, a rate yielding at least some margin of profit and, in practice, slightly in excess of operating expenses.

In its endeavor to escape from the implications which would naturally follow from its adverse decision of the earlier application of the complainant to reduce these identical rates, the Commission summarized the changes in conditions which had occurred since the earlier decision finding these rates not unreasonable, and among them stated the following (R. 57):

"1. The Hoch-Smith resolution was approved subsequent to the presentation of the prior case.*

2. The depression in the deciduous fruit industry has continued unabated for a further period of three years and conditions in 1926 were worse than in 1923 * * *.

*Although the Report in the prior case states "We have given consideration to the matters mentioned in the Resolution" (R. 315).

3. The present economic showing is fully responsive to the terms of the resolution * * *.

6. The financial condition of the carriers principally concerned has further improved."

The ultimate finding of the Commission is on the issues as thus framed by the Commission. That finding is as follows (R. 58):

"Considering the relative rates on and earnings of the deciduous fruit traffic in the light of the condition of the industry and of the service performed by the carriers, and giving due weight to the cost study presented by defendants, we are of the view that the present rates are in excess of the lowest possible lawful rates as herein defined."

This finding falls squarely within the Resolution.

The reference to "the lowest possible lawful rate as herein defined", is clearly an allusion to the Commission's definition of such a rate as one which in principle must be high enough to cover the cost plus at least some margin of profit (R. 26).

The conclusion of the Commission as follows (R. 59):

"We are of the opinion and find upon a consideration of the whole record that the rate of $1.73 as applied to the transcontinental shipment of deciduous fruits from California to Groups A to M, inclusive, except Group J is, and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.60; and that the rate of $1.62 currently applicable to Group J points is,

> and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.50 and that such rates are the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and are necessary to promote the freedom of movement by defendants of the specified products of agriculture, now affected by existing depression in agriculture"

is expressed in almost the exact language of the Resolution. The expression that the existing rate is "unreasonable" is obviously a finding that it is unreasonable judged by the standards of the Resolution, as interpreted by the Commission. It is a finding that the rate then prevailing is in excess of the "lowest possible lawful rate", and is clearly not a finding that the rate is unreasonable measured by the ordinary standards prescribed by Section 1 of the Act. That this interpretation of the finding is correct is supported by the separate concurring opinions of Commissioners Woodlock, Taylor and Eastman, and the dissenting opinion of Commissioner McManamy; it is also supported by the Report on Further Consideration.

Subsequently the Commission cited this case as an example of the application of the Hoch-Smith Resolution.

Lake-Cargo Coal Cases, 139 I. C. C. 367.

The report states that four of the eleven Commissioners did not participate in the disposition of the case (R. 65). This means that seven did participate, and the affirmative vote of four was necessary to the

order. Commissioner McManamy dissented. Commissioner Woodlock, joined by Commissioner Taylor filed a separate concurring opinion, and Commissioner Eastman filed a separate concurring opinion. Two other commissioners therefore joined with Commissioner Aitchison in the principal report. The vote of one of the Commissioners filing a separate concurring opinion was necessary to the validity of the order. Commissioner Eastman, in his concurring opinion, states (R. 59):

> "While it is by no means clear that the rates in issue are unreasonable and ought to be reduced, complainant is entitled under the Hoch-Smith resolution to the benefit of the doubt, and I can for that reason accept the results reached."

We will later point out that Commissioner Eastman changed from an assenting to a dissenting opinion in the report on further consideration.

Commissioner Woodlock, with whom Commissioner Taylor concurred, in his separate concurring opinion said (R. 60):

> "The Hoch-Smith resolution (which governs the disposition of this case) contains other injunctions addressed to us besides that which requires the lowest possible lawful rate on products of agriculture suffering from depression."

Commissioner McManamy, dissenting, said (R. 63):

> "The majority report as well as the concurring expressions show that the decision is predicated upon the Hoch-Smith Resolution."

That it is permissible to refer to separate concurring or dissenting opinions in interpreting a report of the Commission is established in the case of *Southern Pacific Company v. Interstate Commerce Commission*, 219 U. S. 433.

In the Report on Further Consideration, the Commission, after admitting an error of $20.79 per car in its previous computation of the cost of carriage, and, having previously prescribed what it considered the lowest possible lawful rates, concludes (R. 68):

> "On the whole record, we adhere to our former finding that the present rates are unreasonable and we are not convinced that the rates prescribed are below what are necessary to afford complainants the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

The conclusion expressed by the Commission that the existing rates and all rates in excess of the new rates are unreasonable should not therefore be regarded as an independent finding that the old rates were unreasonable as that term is used in Section 1 of the Interstate Commerce Act.

> *United States v. New York Central Railroad*, 263 U. S. 603.

The conclusion of the Commission was directed to the issue framed and specifically stated by the Commission (R. 56):

> "The primary issue to be determined, therefore, is whether the $1.73 rate assailed approaches the

lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us."

The conclusion was therefore based upon the Resolution as construed by the Commission and the word "unreasonable" was merely a symbol used by the Commission to express the following:

(a) That the California deciduous fruit industry is in a state of depression;

(b) That the reduced rates are necessary to permit the movement of deciduous fruit freely at a profit to the shipper;

(c) That the new rates are fixed pursuant to the mandate of the Hoch-Smith Resolution at the lowest extremity of the zone of reasonableness; and

(d) That the new rates will afford the carriers a revenue slightly in excess of operating exepnses, and although probably of less than average profitableness, shall leave the traffic attractive to the carriers (R. 67).

It is true that the Commission had before it and discussed at some length, evidence introduced by the complainant for the purpose of showing that the rate was unreasonable *per se*—that is, under Section 1 of the Act. But it is equally true that the Commission did not consider the reasonableness of the old rate to be the issue in the case and therefore did not intend to find

and did not in fact find that the old rate was unreasonable *per se*. What the Commission did was find that the $1.73 rate was not "the lowest possible lawful rate compatible with the maintenance of adequate transportation service" as defined by the Commission, and fix $1.60 as such a rate.

It will no doubt be urged that the expression in the opinion that the "rate of $1.73 * * * is, and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.60" is a finding that the rate is unreasonable *per se* as judged by the standard of Section 1 of the Act, and without reference to the Resolution. It is submitted that this expression, couched in the usual formal language of the Commission cannot acquire a meaning never intended by the Commission, by being lifted out of its context and segregated from the remainder of the report. This expression must be read with the rest of the report and given a meaning consistent with it. What is of importance here is not what the Commission said, but what it did. What it did was to apply the mandate of the Resolution as it interpreted it.

It is well settled that the formal findings in an order of the Commission do not conclusively determine the nature and character of the order of the Commission or conclusively fix the grounds on which it is based. The whole report may be examined to determine the real grounds on which the Commission's order is based and its nature and character. It is equally

well settled that the substance and not the mere form of the report is to be regarded in determining the theory upon which the Commission acted.

The expression of the court in *Southern Pacific Company v. Interstate Commerce Commission*, 219 U. S. 433, 444, 449, is particularly apposite here. The court defined the issue as:

> "What was the nature and character of the order made by the Commission? That is, what, in substance, was the power which the Commission exerted in making the order?"

It concluded its discussion in these words:

> "While it is true that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered as a whole, in the light of the condition of the record to which we have referred, it clearly results that it was based upon the belief by the Commission that it had the right, under the law, to protect lumber interests of the Willamette valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate, which had prevailed for some time, to a just and reasonable charge for the service rendered for the future. Manifestly, this was deemed by the Commission to be the power which was being exerted, since Mr. Commissioner Harlan, joined by the Chairman of the Commission, dissented on the ground that the order was an exertion of a power

not possessed, to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate to the contrary."

In the case mentioned the carriers had proposed an increased rate on lumber. The shippers complained and charged that the rate "was unreasonable in and of itself and discriminatory".

In its report and order the Commission had found that the proposed advance was "unreasonable" but, as pointed out above, the Court concluded that this finding was not to be considered as an independent finding that the rate was in fact unreasonable as measured by the law applicable.

In the so-called *Passenger Scrip Case, (United States v. New York Central Railroad Company,* 263 U. S. 603), the Court reviewed the action of the Commission, in applying an act of Congress directing the Commission to require the railroads to issue interchangeable mileage or scrip tickets at just and reasonable rates. After a hearing, the Commission ordered the railways to issue scrip tickets to be sold at a reduction of 20% from the face of the tickets. In holding the order of the Commission void, Mr. Justice Holmes, speaking for the Court, said:

"It is further alleged in the bill that the conclusion stated by the Commission, that the reduced rates established by it for scrip coupon tickets will be just and reasonable for that class of travel is contrary to the specific facts found by the Commission, and is not to be taken as an independent finding of fact, but only as a conclusion

> or ruling reached by it upon a misinterpretation of the law."

The Justice then pointed out that the report of the Commission showed that the Commission had not attempted to reach an independent conclusion as to whether the reduced rates were just and reasonable upon the record introduced, but that its action was based upon the supposed mandate of Congress that the tickets be sold at reduced rates, and concluded (p. 611):

> "It seems to us plain that the Commission was not prepared to make its order on independent grounds apart from the deference naturally paid to the supposed wishes of Congress."

Here it is plain that the conclusion that the existing rates were unreasonable was not based "on independent grounds", but solely upon the supposed mandate of the Resolution.

Other cases laying down the same principles are:

Cincinnati, New Orleans and Texas Pacific Railway Company v. Interstate Commerce Commission, 162 U. S. 197;

Atlantic Coast Line R. Co. v. Interstate Commerce Commission, 194 Fed. 449.

Legislative history of the Hoch-Smith Resolution.

The Hoch-Smith Resolution is a joint resolution which received the approval of the President on Jan-

uary 30, 1925. In substance it was framed by a consolidation of two resolutions proposed in Congress, one in the Senate and one in the House of Representatives.

For the purpose of determining the meaning of any ambiguity in an act of Congress it is proper to refer to its legislative history. For this purpose the reports of the Committees of either House of Congress in connection with the bill may be considered.

Binns v. United States, 194 U. S. 486, 495.

Likewise statements made by the members of committees in charge of such a bill in the course of its passage may be consulted.

Cassarello v. United States, 271 Fed. 486.

Discussion between members of the House of Representatives or of the Senate during a debate upon such a bill, and the responses made thereto by members of a committee in charge of the bill, are in the nature of a supplementary committee report and will be consulted by the court to clarify any ambiguity in the language of the bill.

United States v. St. Paul, Minneapolis & Manitoba Railway Company, 247 U. S. 310, 318.

On March 28, 1924, Senator Smith introduced Senate Joint Resolution No. 107, declaring agriculture to be the basic industry of the country, and for other purposes. It was referred to the Senate Com-

mittee on Interstate Commerce and on the same day was reported favorably by the Committee to the Senate with amendments. Before consideration by the Senate the resolution was amended, however, and was considered by the Senate, in the following form:

> "That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered, in so far as it is legally possible to do so, to the end that commodities may freely move with fair profit to the producer and sold at a reasonable price to the consumer.
>
> "It is further declared that agriculture is the basic industry of this country; and that it is the policy of Congress to promote, encourage, and foster that industry, and especially in rate making during the existing depression in agriculture. In furtherance of these policies the Interstate Commerce Commission is hereby directed, with the least practicable delay, to effect such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *provided,* That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the commission involving rates on products of agriculture, and the policy herein stated shall be applied in such determination as soon as possible."

(Cong. Rec., Vol. 65, Part 8, page 8336).

During the consideration of this Bill by the Senate, Senator Smith and Senator Cummins, the authors of the resolution, explained its meaning, and in this connection Senator Smith stated as follows:

> "Permit me to state to the Senator that really there is no new proposition involved in it. It is simply a direction to the Interstate Commerce Commission that whenever there is a depression in any of the basic industries of the United States, as there has been in agriculture, the commission should take cognizance thereof, and regulate the rates so as to facilitate the movement of the products of that industry." (Cong. Rec. Vol. 65, Part 8, page 8336).

In response to a question regarding the meaning of the resolution, Senator Cummins said:

> "Undoubtedly the Interstate Commerce Commission has complete and adequate power to reduce freight rates in exact accordance with the declaration made by this joint resolution, and while the Interstate Commerce Commission has, since the 1st of September, 1920, reduced rates upon agricultural products very markedly, yet I think it is wise again to call the attention of the commission and of the country to the principle which should underlie rate making in basic commodities."
>
> (Cong. Rec., Vol. 65, Part 8, page 8337.)

Prior to the introduction of this resolution in the Senate, Representative Hoch, on December 17, 1923, had introduced in the House of Representatives a joint resolution known as House Joint Resolution

No. 94 (Cong. Rec., Vol. 65, Part 1, pages 345-6), directing the Interstate Commerce Commission to take action relative to adjustments in the railroad freight structure and the fixing of rates and charges. On January 16, 1924, Representative Hoch introduced a similar resolution known as House Joint Resolution No. 141 (Cong. Rec., Vol. 65, Part 2, pages 1070-1), directing the Interstate Commerce Commission to take action relative to the adjustments in the rate structure of common carriers. The Committee of the House on Interstate and Foreign Commerce reported favorably on this resolution on May 13, 1924 (Cong. Rec., Vol. 65, Part 8, pages 8496-7). Senate Joint Resolution No. 107 having been passed by the Senate on May 12, 1924, was referred to the House on the following day, and was considered by the Committee on Interstate and Foreign Commerce of the House. On May 27, 1924, this Committee reported Senate Joint Resolution No. 107 to the House with amendments (Cong. Rec., Vol. 65, Part 10, page 9675).

The resolution as so reported to the House consisted of a consolidation of the substance of Senate Joint Resolution No. 107 as passed by the Senate, and House Joint Resolution No. 141. In its report the House Committee summarized the intent and purpose of the resolution as follows:

> "This resolution is based upon the proposition that the present freight structure is out of adjustment, and that certain commodities, particularly agricultural products, are, in general, bearing an unfair proportion of the freight burden.

"The resolution does not propose that Congress enter upon the technical job of rate making, but directs the Interstate Commerce Commission to proceed upon the inquiry and to remove as far as possible the injustices and maladjustments that now exist. Two of the principal features of the resolution are, first, that the commission is directed in making the revision to give regard to the general and the comparative levels in the market value of the various classes and kinds of commodities as indicated over a reasonable period of years, and, second, to make such adjustments as will give regard to a natural and proper development of the country as a whole.

"The present freight structure, which has grown up piecemeal and is a result of all sorts of local considerations, has long been out of adjustment. This maladjustment has been greatly increased by the flat, horizontal percentage increases in freight rates which have been made in recent years. These flat, horizontal increases were not scientific. The method used was grounded on expediency and the need for prompt action.

* * * * * * *

"This improper distribution of the freight burden has borne particularly heavy on the products of the farm owing to the price deflation in those products. The present structure does not give proper weight to the question of what the traffic can fairly bear. The cost of the service to the carriers is not the only factor that must be considered but the value of the service to the shipper as well.

"It is realized that freight rates cannot be constantly changed in order to meet fluctuations in the market price of commodities. The resolution does not propose that that be done. It simply proposes that regard shall be given these changes in

price as indicated over a reasonable period of years.

* * * * * * *

"A year ago the United States Chamber of Commerce named a special committee to make a study of this question, and on November 14, 1923, that committee made its report. On that committee were railroad traffic managers and other officials of the carriers and prominent business men of the country. In its report the committee said:

> "'It cannot be claimed that the railroad freight rate structure of the United States has ever been organized on a scientific basis, or that it has ever been systematically revised with the purpose of eliminating disparities. The great economic changes incident to and resulting from the war have created additional disparities resulting from horizontal rate changes, from the dislocation of relative price levels, and from increases in labor costs and terminal expenses which have borne with greater weight on some classes of traffic than others. This situation renders a readjustment of relative freight rates of great immediate importance.'

"In his message to Congress in December, President Coolidge uttered this terse but comprehensive statement:

> "'Competent authorities agree that an entire reorganization of the rate structure for freight is necessary. This should be ordered at once by Congress'."

(Report No. 735, House Committee on Interstate and Foreign Commerce, May 13, 1922.)

The resolution at this time contained two paragraphs: One paragraph stated the substance of House

Joint Resolution No. 141, which directed the Interstate Commerce Commission to investigate the rate structure of the country and to make such changes as might be necessary to correct any defects therein, and directed the Commission, in making such investigation, to give due regard to certain factors, such as the general and comparative levels in market value of various commodities, the proper development of the country as a whole, and the maintenance of an adequate system of transportation. The second paragraph of the resolution directed the Interstate Commerce Commission to effect such reasonable and lawful changes in the rate structure of the country as would promote freedom of movement by common carriers of products of agriculture affected by the depression at the lowest possible *reasonable and lawful rates* compatible with the maintenance of adequate transportation service.

The resolution as it then existed did not differ substantially from the form ultimately adopted. The real purpose and effect was explained by Representative Hoch in the following language:

> "This resolution consists of two paragraphs. The first paragraph is identical with House Resolution 141, which I introduced some weeks ago and which was recently reported favorably from the committee. The second paragraph is matter taken substantially from a portion of the Senate resolution which is here amended by the House and which we have before us. The first part of this resolution proposes a general survey by the Interstate Commerce Commission of the freight structure of the country, and directs that such in-

justices and inequalities as found existing shall be corrected by the commission. It also directs the commission to take into consideration, among other things, the relation in prices of various classes and kinds of commodities as indicated over a reasonable average of years, and also does one or two other things which I will refer to later.

* * * * * * *

"The first paragraph of this resolution is in exact compliance with that recommendation, and proposes not that Congress shall make rates, for obviously Congress cannot take upon itself that technical duty, but directs the Interstate Commerce Commission to enter upon a comprehensive study and survey of the freight structure and to remove disparities and inequalities, as far as possible, without injuring adequate transportation service.

* * * * * * *

"* * * The second paragraph of this resolution is taken in substance from the Senate resolution. It makes special reference to agricultural products, including livestock. I want you to notice closely in order that there may be no misapprehension about it. I do not claim that this is any panacea or anything of that sort. It does not direct particular rates upon farm products, although I am firmly convinced that a study will show that those rates in many cases ought to be reduced, but it does call the attention of the Interstate Commerce Commission by the Congress, which has the right to speak to the commission, which is an agency of the Congress, to the great agricultural depression existing in the country and it says to the Interstate Commerce Commission:

"'We direct that you shall with the least practicable delay make such changes in the

freight rates upon farm products, including livestock, as will as far as possible correct any injustices that may be found to exist and promote the freedom of the movement of these products.'

But, as gentlemen will notice by reading the resolution, it does not contemplate that there shall be anything ruthless done; in fact, it specifically provides that it shall not interfere with the maintenance of an adequate transportation service."

(Cong. Rec., Vol. 65, Part 11, page 11019.)

Representative Hoch at the close of the debate in the House upon the Resolution as it then stood, summarized the purpose and effect of the Resolution, as follows:

"The gentlemen who say that this will not have any effect except in the far distant future are speaking without familiarity with the facts as they exist, and there is no provision here and no requirement or expectation that any rate which is not compensatory shall be levied. But certainly every one knows that there are adjustments that should be made, and this resolution provides that within reason and within the law wherever they can possibly find any adjustments that will not work injury to adequate transportation service and are in the interests of agriculture, including livestock, they shall make them; and I understand the only objection so far offered, outside of the objections of the gentleman from Alabama, by any one here, is that they are afraid that the Republican Party might possibly get a little credit for the passage of this resolution."

(Cong. Rec., Vol. 65, Part 11, page 11026.)

The Senate and the House having disagreed upon the final form of the Resolution, a Conference Committee was appointed which agreed upon the bill in its final form. As finally passed the Resolution contained three paragraphs. The first paragraph, which was taken from the original Senate Resolution is:

> "* * * That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries shall be considered in so far as it is legally possible to do so, to the end that commodities may freely move."

In adopting this language the Conference Committee and Congress struck out the last clause of the paragraph, which provided that commodities should freely move "with fair profit to the producer and sold at a reasonable price to the consumer".

Representative Rayburn, speaking in support of the bill, stated the real purpose of this paragraph in the following language:

> "* * * Freight rates are like tariff taxes in that rates may be set so high that traffic will not move and, therefore, less revenue will be collected than there would be on a lower rate. There is a medium somewhere that is fair to all parties and that rate should be found if possible, and in the passage of this resolution we hope that the Interstate Commerce Commission may, under its direction, build a rate structure that will be fair and reasonable."
>
> (Cong. Rec., Vol. 65, Part 11, page 11023.)

The second paragraph of the Resolution as reported by the Conference Committee contained the substance of House Resolution No. 141, changed only to the extent stated by Representative Hoch, when he said:

> "The only change from the House resolution is in the latter part of the resolution, where the commission is directed to make such 'reasonable and lawful changes' in the rates on agricultural products as are consistent with the maintenance of an adequate transportation system. The word 'reasonable' is stricken out, leaving the Commission to fix such 'lawful' rates, and in the judgment of the conferees this makes no substantial change, as they believe that no rates can be fixed that are 'lawful' which are not reasonable, 'reasonable' taking into consideration all of the elements that should be taken into consideration. We have given very careful thought to it, and in our judgment it does not substantially change the law."
>
> (Cong. Rec., Vol. 65, Part 11, page 11246.)

Finally, the third paragraph of the Resolution contained the substance of the remainder of the Resolution as introduced in the Senate, altered only to the extent that the word "reasonable" is stricken out, which, as stated by the conference report, made no substantial change in the Resolution.

It should be noted that the enactment was a joint resolution approved by the President. While it is true that a joint resolution so approved has the force of law, it is proper to consider the generally recog-

nized difference between an act of Congress and a joint resolution.

> "The difference between an Act of Congress and a Joint Resolution is that the former governs all persons under the jurisdiction of the enacting power, while the latter is but a rule for the guidance of the agents and servants of the sovereign. 26 Am. & Eng. Enc. L. 560 and Notes."
>
> *S. H. Hawes & Company v. Wm. R. Trigg Co.*, (Va.) 65 S. E. 538-552; 110 Va. 165.

The true meaning and proper interpretation of the Resolution.

In the light of its legislative history, the Resolution did not alter the existing law in any respect. It contains certain instructions to the Interstate Commerce Commission, which may be summarized as follows:

(a) By the first paragraph Congress instructed the Interstate Commerce Commission that in the fixing of rates it should take into consideration the conditions which at any given time prevail in our several industries to the end that commodities should freely move. This is no new principle in rate making, but it does reflect the opinion of the Congress that the rate structure of the country had in the past been too rigid and fixed, and had not accommodated itself readily to changed and changing conditions.

(b) The second paragraph of the Resolution contains a direction to the Interstate Commerce Commission to make a thorough investigation of

the rate structure of common carriers for the purpose of determining to what extent existing rates are unjust, unreasonable, unjustly discriminatory or unduly prejudicial, and to make, in accordance with law, such changes as might be necessary to correct any defects so found to exist. This paragraph is a direction to the agents of the government to make a thorough, comprehensive and scientific study of the rate structure of the country as a whole and to make such readjustments as were necessary to eliminate the existing inequalities and defects and make it a scientific and harmonious whole.

(c) By the third paragraph of the Resolution the Commission was directed in connection with such investigation to effect, without delay, such changes in the rate structure of the country as would promote the freedom of movement by common carriers of the products of agriculture and to remove the unjust burdens placed upon agriculture by reason of the mal-adjustment of the rate structure of the country. This paragraph adds nothing to the duties of the Commission enjoined in the first two paragraphs; nor does it prescribe any new standard for rate making. The readjustment in agricultural rates was to be on the same basis and for the same fundamental reasons that any of the other readjustments were to be made, namely, that if the rates on agriculture were unreasonable or unduly burdensome, or out of adjustment, they were to be changed. But

the paragraph did direct the Commission to give its first attention to rates on agricultural products. Agriculture was suffering from depression; it was to be given first aid. This object is summarized in the report of the Committee of the House of Interstate and Foreign Commerce, as follows:

> "It is not contemplated that the commission shall wait until the whole inquiry is completed before making adjustments, but the resolution directs that from time to time they shall make such changes, in rates as justice and fairness require in view of the facts already produced."
>
> (Report No. 735, House Committee on Interstate and Foreign Commerce, May 13,1924.)

The Interstate Commerce Act, as it existed at the time the Resolution was passed, was not altered in any respect. This was recognized by the debates in Congress. Representative Shallenberger quoted from hearings in the Committee on Interstate and Foreign Commerce on the bill, and it appeared that it was the understanding of the Committee that Section 15a of the Interstate Commerce Act was not thereby altered. Representative Hoch stated that the Interstate Commerce Commission already had the power which it was directed by the resolution to exercise. Senator Cummins was of the same opinion. Representative Rayburn stated:

> "This resolution directs the Interstate Commerce Commission to do something which some

claim they have the power of doing now but which they do not care to undertake without the express direction of Congress to go into the whole rate structure of the country and try in a lawful way to iron out the inequalities that exist in that structure."

(Cong. Rec. Vol. 65, Part 11, Page 11022.)

The Resolution was based upon the belief of Congress that due to various causes the rate structure was unscientific and subject to many mal-adjustments; that parts of the structure did not conform to existing requirements of the law. An investigation of the whole structure was ordered to be made by the Commission with the special direction to determine as quickly as possible whether such illegalities affected agricultural products, and if so to remove them forthwith, since agriculture being in a depressed condition was in no condition to bear any unlawful burdens.

I. Errors of the Commission in construing and applying the Resolution.

A. The Commission construed the Resolution to require it to reduce an existing rate on agricultural products, notwithstanding that the existing rate was reasonable, and otherwise lawful. This was a misconstruction of the Resolution. The Resolution required that the Commission reduce existing rates on agricultural products only if such rates were unreasonable or discriminatory, or otherwise unlawful as measured by the provisions of the Interstate Commerce Act.

The Resolution properly construed did not change the law which existed prior to its enactment. It did not

prescribe any new or different standard of lawfulness; and it did not authorize the Commission to depart from the standards of rate making which were prescribed in the Interstate Commerce Act. The Commission, pursuing what it considered to be the intent of Congress that rates on agricultural products suffering from depression should be reduced, proceeded to reduce this rate to a point where in the view of the Commission it would yield to the carriers a return slightly exceeding operating expenses. In so doing it substituted what it considered the wishes of the Congress for the requirements of the Resolution. The situation is similar to that in the *Passenger Scrip Case* (*United States v. New York Central Railroad Company*, 263 U. S. 603, 611), where Mr. Justice Holmes aptly said in speaking of an order of the Commission directing the issue of mileage ticket at a reduced rate, "But we think it erred in reading the wishes that originated the statute as an effective term of the statute that was passed, * * *".

The purpose of those who advocated the Resolution may have been to hold out to the agricultural interests the prospect of decreased rates on the products of the farm. But the Resolution, as finally adopted, directed reductions in the rates on agricultural products only where such reductions could lawfully be made that is, where the Commission found that such rates were, for one reason or another, inherently unreasonable, or otherwise in violation of the requirements of the Interstate Commerce Act. The situation

was similar to that in the *Passenger Scrip Case* (supra), where it was said regarding a statute directing the issue of passenger scrip at reasonable rates: "Coming as it did from the agitation for this form of reduced fares, the statute naturally enough carried with it more or less mirage of fulfilling the hope that gave it rise, but in fact it required a determination of what was just and reasonable exactly as in any other case arising under the Interstate Commerce Act." And so here. The Resolution requires the fixing of a just and reasonable rate exactly as in any other case arising under the Interstate Commerce Act.

That the Resolution requires the fixing of rates on agricultural products in exactly the same way, and on exactly the same basis, as other rates, and in the manner and on the grounds prescribed in the Interstate Commerce Act, is clear from the language of the Resolution, and from its legislative history.

The Resolution in terms directed the Commission to effect such "lawful changes" in the rate structure of the country as would promote the freedom of movement by common carriers of the products of agriculture affected by depression at the lowest possible "lawful rates" compatible with the maintenance of adequate transportation service. The expressions "lawful changes in the rate structure" and "lawful rates" mean something and are in the Resolution for a purpose. Congress was careful to provide that the

changes contemplated by the Resolution were to be "lawful changes" and that rates fixed pursuant to it were to be "lawful rates." What do those expressions mean? Obviously they mean that the Commission in carrying out the mandate of the Resolution must comply with the then existing law and must make only such rates as are lawful under the existing law. "Lawful changes" mean changes permitted under the existing law. "Lawful rates" mean rates lawful under the existing law.

Congress, spurred on by the agricultural interests, which thought that agriculture was bearing an undue proportion of the freight rates, and by many, like the Chamber of Commerce of the United States, who thought that the rate structure was not on a scientific basis, and that some rates bore with greater weight on some classes of traffic than on others, and by the President, who said that an entire reorganization of the freight structure was necessary, adopted the Resolution. It directed the Commission, as the agents of the government, to revise the rate structure in accordance with existing law, to do away with the inequalities and injustices that had grown up by reason of its unscientific piecemeal growth, and to give first aid and attention to agriculture in its work of revision. But it fixed no new standards, and it did not change the existing law.

The authors and sponsors of the Resolution made this plain when it was under consideration in Con-

gress. Senator Smith said, "Permit me to state to the Senator that really there is no new proposition involved in it" (Cong. Rec. Vol. 65 part 8, page 8336). Senator Cummins said, "Undoubtedly the Interstate Commerce Commission has complete and adequate power to reduce freight rates in exact accordance with the declaration made by this joint resolution * * *" (Cong. Rec. Vol 65, part 8, page 8337). Representative Hoch, in referring particularly to the paragraph relating to rates on agricultural products, said:

> "I want you to notice closely in order that there may be no misapprehension about it. I do not claim that this is a panacea or anything of the sort. It does not direct particular rates upon farm products, although I am firmly convinced that a study will show that those rates in many cases ought to be reduced, but it does call the attention of the Interstate Commerce Commission by the Congress, which has a right to speak to the commission, which is an agency of the Congress, to the great agricultural depression existing in the country, and it says to the Interstate Commerce Commission:
>
> " 'We direct that you shall with the least practicable delay make such changes in the freight rates upon farm products, including livestock, as will as far as possible correct any injustices that may be found to exist and promote the freedom of movement of these products.' " (Cong. Rec. Vol. 65, part 11, page 11019).

There is nothing here about reducing rates on agricultural products, except in so far as it may be necessary to correct "injustices" that may be found

to exist; there is no suggestion here that such rates are to be fixed according to any new standard; there is no suggestion here that there is the slightest change in the fundamental law. All agree that the old law stands unchanged. But the Commission is given sharp orders to see that the existing law is enforced and that present injustices are corrected, first attention being given to agriculture. Such "injustices" exist only where the rates are in violation of the requirements of law, and "lawful changes" are only those necessary to correct such illegalities.

The Commission itself, in an earlier proceeding, says of the Resolution, "It sets no new standard of lawfulness * * *."

Grain and Grain Products, 122 I. C. C. 235, 264.

But in the face of all this the Commission proceeds in the present case to state, "We again conclude that 'the lowest possible lawful rates' which we may prescribe *under the resolution* on any given agricultural traffic as to which depression has been shown must be somewhere within the zone of reasonableness permitted by the flexible limits of discretion reposed in us, and that such rates must be put as near the lowest limit or level of that zone as is compatible with the maintenance of adequate transportation service" (R. 28). What this lower level or limit is in this case is apparent from the face of the report. It is a rate which "must *in principle* be high enough to cover all the cost that may fairly be allocated to the service

plus at least some margin of profit" (R. 26). It is a rate "slightly above the operating expenses," and "probably of less than average profitableness" (R. 67). It is a rate which the Commission designedly attempted to fix just high enough above the point of confiscation to escape the ban of the Fifth Amendment. At no time did the Commission intend it to be that "just and reasonable" rate mentioned in the Interstate Commerce Act, or intend to fix it upon the basis prescribed in that Act. It had already decided that the old rates were not in violation of any provision of the Interstate Commerce Act (100 I. C. C. 79). The Commission construed the Resolution as requiring it to cease exercising its discretion in so far as rates on agricultural products suffering from depression were concerned, and to perform the purely mechanical function of fixing "the minimum charge that can be made for the service and permit the carrier to live" (R. 27).

Such a construction does violence to the very terms of the Resolution, and runs counter to its meaning as explained by its authors and sponsors. The Resolution requires that the changes be "lawful changes" and that the rates be "lawful rates"; lawful in view of the existing law.

The Interstate Commerce Act and the Constitution constitute the law referred to in the Resolution.

Section 1 of the Act provides that:

> "All charges * * * shall be just and reasonable, and every unjust and unreasonable charge * * * is prohibited and declared to be unlawful";

Section 3 of the Act provides that:

> "It shall be unlawful * * * to make or give any undue or unreasonable preference or advantage * * * or to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage * * *."

Section 15 of the Act provides:

> "That whenever, after full hearing, * * * under an order for investigation and hearing made by the Commission of its own initiative, * * * the Commission shall be of the opinion that any * * * rate * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, * * * the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable * * * rate * * *."

These provisions fix and limit the authority of the Commission. They constituted the law governing the power of the Commission in prescribing rates at the time of the passage of the Resolution. They constitute the measure of the "lawful" changes and the "lawful rates" which the Commission was authorized to prescribe under the Resolution.

The phrase "lowest possible lawful rates" in the Resolution is not inconsistent with this interpretation. The word "lawful" is not intended to mean something different from "reasonable," or to fix a different standard than would be fixed by the use of the word "reasonable." One of the drafts of the Resolution used the expression "lowest possible reasonable and lawful rates."

Representative Hoch, in explaining why the word "reasonable" had been stricken out, said:

> "* * * In the judgment of the conferees this makes no substantial change, as they believe that no rates can be fixed that are 'lawful' which are not reasonable, 'reasonable' taking into consideration all of the elements that should be taken into consideration. We have given very careful thought to it and, in our judgment, it does not substantially change the law." (Cong. Rec. Vol. 65, part 11, page 11246).

Where, then, is the warrant for the Commission to reduce an admittedly reasonable rate? It cannot be found within the provisions of the Interstate Commerce Act.

Not only does no warrant appear in the Act for the reduction by the Commission of a reasonable rate, but it appears from the Act that the Commission is under certain affirmative duties with respect to the fixing of rates. Section 15a (2) provides:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and with reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *provided,* that the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

So not only do we find an utter absence of authority in the Commission to lower a reasonable rate, but we find an affirmative duty upon the Commission to initiate and establish rates which will yield the carriers, as a whole, a fair return. In order that this provision might not be construed to deprive the Commission of its power to reduce unreasonable rates, the Congress *ex industria* added the provision retaining in the Commission power to "modify or adjust any particular rate which it may find to be unjust or unreasonable."

It is submitted that when the Commission deemed itself under the duty to reduce a reasonable rate

because it was not in the judgment of the Commission "the lowest possible lawful rate" (i. e., just above the point of confiscation), it misapplied and misinterpreted the Resolution. The purpose of the Commission to reduce rates on agricultural products suffering from depression may have been laudable, but that object could only be accomplished in those cases where the existing rates were unreasonable under the existing law. Here it is plain that the existing rates were reasonable as judged by the standards of existing law and that they were so considered by the Commission. It follows that the order reducing the rates is invalid.

The Commission in this case seems to have followed the same mental processes as witness Hendrick, who testified before the Commission (R. 196).

> "There was a time when railroads begged for assistance and they got it and the farmer paid the bill. The farmer is today in exactly the same position that the railroads were then. He is asking the government of the United States and the railroads to get behind him and give him relief. The government cannot change climatic conditions, but it can change many things, among them freight rates. There ought to be a very considerable reduction in freight rates."

The wish may have been father to the thought, but the accomplishment of the wish "required a determination of what was just and reasonable exactly as

in any other case arising under the Interstate Commerce Act". *United States v. New York Central R. R.* (supra). The Commission here did not pretend to determine what was "just and reasonable" just as in any other case. It considered that Congress had prescribed a new measure, a rate barely above the point of confiscation, and it was rigidly applying that measure. In this it erred, and the order is therefore void.

B. If the Resolution properly construed authorizes the Commission to reduce existing reasonable rates, such reduction is only authorized where it is "compatible with the maintenance of adequate transportation service". The Commission has interpreted this to mean that a reasonable rate may be reduced, although the carriers are not earning the fair return specified pursuant to Section 15a. This is in effect to repeal Section 15a, and is an improper interpretation of the Resolution. If the Resolution authorizes the Commission to reduce a reasonable rate, where the carriers are not earning a fair return, it also requires that other rates be adjusted simultaneously so that the carriers' revenue already inadequate, will not be impaired further.

The Resolution directs the Commission to effect such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by depression at the lowest possible lawful rates compatible with the maintenance of adequate transportation service.

We have already pointed out that this prescribed no new standard of rate making, invested the Commis-

sion with no greater or different powers than it already possessed, and left the provisions of the Interstate Commerce Act unchanged. Perhaps it was an excess of caution that induced the Congress not only to provide that the rates prescribed under the Resolution should be "lawful changes," and the rates "lawful rates," but also to specify that such rates must be "compatible with the maintenance of adequate transportation service." These words were not picked out of the air. They are strangely like the words, "in order to provide the people of the United States with adequate transportation," which appear in Section 15a (3) of the Interstate Commerce Act. They are even more similar to the expression used in *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, 585, where this court in speaking of the Transportation Act said, "The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and take other important steps to maintain an adequate railway service for the people of the United States."

From the text of the Resolution it is therefore clear that the Congress intended that the Commission in proceeding under the Resolution should do nothing which would interfere with the affirmative duty imposed upon the Commission by Congress, to fix rates so that the country would be provided with an adequate system of transportation.

Until the enactment of the Transportation Act of 1920, regulation of the carriers had been repressive in character. The government was concerned merely with the prevention of certain abuses by the railroads, including the charging of unreasonable rates and discriminatory practices. The Transportation Act marked a new departure, in which for the first time the Congress recognized that railroad problems required affirmative treatment as well as repression. The affirmative policy of providing the country with an adequate system of transportation by requiring that rates be fixed so as to yield the carriers a fair return, was concretely stated in Section 15a of the Act, and may be summarized as follows:

Section 15a imposed upon the Commission the affirmative and continuing duty,

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole * * * will * * * earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return * * *"

and further,

> "The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon * * *. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity * * * of enlarging such facilities, in order to provide the people of the United States with adequate transportation * * *."

The purpose and effect of this legislation has been aptly summarized by this court in the *New England Divisions Case,* 261 U. S. 184, 189, as follows:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission, new powers were conferred and new duties were imposed."

In *Dayton-Goose Creek Railway Company v. United States,* 263 U. S. 456, 478, the court said:

> "The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution,

> their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

Shortly after the enactment of the Resolution, it was urged in behalf of certain shippers in a proceeding pending before the Commission, in which carriers in the Western District were seeking increases in freight rates (*Revenues in Western District Ex Parte 87*, 113 I. C. C. 3), that the Hoch-Smith Resolution,

> (1) "had the effect of repealing those portions of Section 15a of the Interstate Commerce Act on which the carriers petitions were based," and
>
> (2) "that the rates on agricultural products, including livestock, in effect at the time of the approval of the Resolution, became in effect the legislative maximum rates on those commodities, which may not be increased except upon a finding by us (the Commission) or the courts that the existing rates are confiscatory."

As to the latter contention, the Commission concluded:

> "we are of the view that we are not debarred by the resolution from affording the carriers relief through the medium of a general increase in

rates prior to the completion of the investigation under that resolution, if need for such action arises upon a clear showing of necessity. Both section 15a and the resolution must be given a construction which makes them practicable and workable. See *New England Divisions Case*, 261 U. S. 184, 197."

The contention that the Resolution repealed Section 15a was also rejected by the Commission in the following language:

"With the contention that the resolution repeals section 15a we are not in accord. The resolution has the force and effect of an act of Congress. In it there is no specific repeal of any provision of existing law, and there is no reason for holding that the resolution by implication repealed or suspended the provisions of section 15a.

"The resolution clearly points out that in making any change in accordance with its provisions, we shall give due regard 'to the maintenance of an adequate system of transportation', and that the fixation of the 'lowest possible lawful rates on products of agriculture, including livestock,' shall be 'compatible with the maintenance of adequate transportation service'. These are expressions somewhat similar to those used by the Supreme Court in decisions rendered prior to the adoption of the resolution, specifically referring to the provisions of section 15a wherein Congress indicated that in determining what would be a fair return consideration should be given, among other things, to the transportation needs of the country and the necessity of enlarging such facilities in order to provide the people with adequate transportation. See *Wisconsin R. R. Commission v. C. B. & Q. R. R. Co.*, 257 U. S. 563, 585, de-

cided February 27, 1922; *New England Division Case, supra,* page 190, February 19, 1923; *Dayton-Goose Creek Ry. v. U. S.,* 263 U. S. 456, 478, January 7, 1924. Congress could not have intended to repeal or suspend by indirection so important a provision of law as section 15a."

This was followed by the further significant statement:

> "It is provided by the resolution that we shall prescribe on products of agriculture so affected by depression, including livestock, the lowest possible lawful rates. It is contended, therefore, that the present rates thereon may not be increased unless they are found to be confiscatory. While confiscatory rates are unlawful, it does not follow that all rates which escape confiscation are lawful. As we construe the resolution, it does not prevent increases of rates on all livestock, or on all products of agriculture which are above the point of confiscation."

Evidently the view of the Commission has undergone some change since this was written (July 14, 1926) for in the instant case the Commission consciously and intentionally fixed a rate which it considered would be just above the point of confiscation.

It is clear that the Resolution did not repeal Section 15a. Not even the Commission thought that. But what attention if any did the Commission pay to Section 15a when it considered the rates in this case? What attention did it pay to the explicit provision in the Resolution that the rates must be "compatible with the maintenance of adequate transportation

service"? From the face of the report it is plain that the Commission in this case ignored its affirmative duties under Section 15a and disregarded the requirement of the Resolution that the rates be compatible with the maintenance of adequate transportation service.

The reduction ordered by the Commission deprived the carriers of annual revenue in excess of $2,700,000 per annum. This revenue was taken principally from the western carriers who handle the bulk of the traffic. The western carriers deprived of this revenue were admittedly not earning the fair return prescribed pursuant to Section 15a. We have, therefore, an order of the Commission, depriving carriers who are not earning a fair return, of revenue in excess of $2,700,000 per annum. And this reduction in revenue results not from the lowering of an unreasonable rate, but from the lowering of a reasonable rate, which was lowered because it was in excess of what the Commission considered to be the "lowest possible lawful rate compatible with the maintenance of adequate transportation service". But how can a rate be compatible with the maintenance of adequate transportation service when it is brought about through the reduction of a reasonable rate, and is accompanied by a reduction of more than $2,700,000 in the annual revenue of carriers which are not earning the fair return prescribed pursuant to Section 15a? It is submitted that the Commission in this case consciously and intentionally fixed a rate which was not com-

patible with the maintenance of adequate transportation service, and that the order is therefore void.

What the Commission set out to do and what it did.

The Commission, as has already been pointed out, set out to fix a rate "at the lowest limit or level" of the zone of reasonableness which was defined by the Commission to be at or above "the minimum charge that can be made for the service and permit the carrier to live" (R. 27). That the Commission carried out its intention with precision is shown by the Commission's own estimate of what it did. It stated (R. 67) that if the cost study of the carriers was accepted (and in its original report it did accept it),

> "it would indicate that the prescribed rates are slightly above the operating expenses and would confirm the impression obtained from comparison with other rates that the new rates, while probably of less than average profitableness, would still leave the traffic attractive to the carriers".

The new rates in the opinion of the Commission would yield something over operating expenses.

What of the condition of the carriers? The Commission finds (R. 56):

> "While all the defendants who handle the bulk of the deciduous fruit traffic have not as yet made the fair return, their financial condition is relatively strong. It seems clear that the reduction requested, if granted, would not affect the maintenance of adequate transportation service."

Bearing in mind that the expression "maintenance of adequate transportation service" has reference to the provisions of Section 15a, which place the affirmative duty upon the Commission to fix rates that will yield the carriers a fair return, how can a reduction of $2,700,000 in the revenue of carriers which the Commission admits and finds (R. 53) are not earning their fair return be compatible with the maintenance of adequate transportation service? The test is not whether the financial condition of the carriers is relatively strong. "Relatively strong" means only that the carriers are better off financially than they were during a period when their finances were in a state of demoralization. What finally determines whether there is to be adequate transportation service in the future, which is the object sought to be achieved by Section 15a, and the object sought to be protected by the specific language of the Resolution, is whether the carriers are earning a fair return. It is submitted that this statement of the Commission shows that it misconstrued the Resolution and failed to observe Section 15a when it entered its order reducing the revenue of the carriers by $2,700,000 per annum.

It is true that Section 15a does not prevent the Commission from reducing a rate which is unreasonable. That power is expressly reserved by the provision in Section 15a that "the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable".

But, as has been shown, the rate here was not unreasonable, and was not considered by the Commission to be unreasonable. It was reduced not because it was unreasonable but because the Commission considered that it was not the "lowest possible lawful rate", according to its own definition.

The Commission devoted considerable attention to the condition of the carriers. But its findings in this respect do not support its order. On the contrary, they show that the order is not "compatible with the maintenance of adequate transportation service".

The Commission found (R. 53):

> "Of the traffic involved, over one-sixth originates on short line railroads in California. At least four of these are now operating at a deficit."
>
> "The Santa Fe and the Baltimore and Ohio are the only carriers shown as having earned in excess of 5.75 per cent in 1926. For 18 principal carriers in the western district, including the Illinois Central system, the average return in 1926 was 4.43 per cent and for five principal carriers in the eastern district, 4.9 per cent. All the foregoing rates of return are computed with respect to the property investment accounts."

This compares with the 5.75% fixed by the Commission as a fair return pursuant to Section 15a (68 I. C. C. 676).

It is submitted that the Commission in fixing the new rate considered that it was authorized to reduce an existing reasonable rate, if it was not what the

Commission considered the lowest possible rate, and that it considered that it was authorized to reduce such a reasonable rate even though it deprived carriers which were not earning a fair return, of annual revenue in excess of $2,700,000. This is a misconstruction of the Resolution and a violation of law, because it is not the fixing of the "lowest possible lawful rate compatible with the maintenance of adequate transportation service", nor is it a compliance with the duty imposed upon the Commission by Section 15a to fix rates that will yield the carriers a fair return.

The very most that could be said in such a situation if the Hoch-Smith Resolution is to be given the effect contended for by the Commission would be that if carriers, not earning a fair return, are to be deprived of revenue by the reduction of a reasonable rate, such reduction must be accompanied by the simultaneous increase of other rates, so as to preserve the carriers' revenues reasonably intact. This would not be a proper construction of the Resolution, but it would come much closer to the mark than the action of the Commission in this case. No attempt was made to do that much in this case.

C. The Commission erroneously construed the provisions of the Resolution respecting "freedom of movement by common carriers of the products of agriculture affected by that depression" to mean that notwithstanding a long, steady and "enormous increase in the tonnage of such fruits" in interstate commerce, freedom of movement did not exist unless the shippers were making a profit.

The Resolution declares it to be the true policy in rate making "that conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move". It further directs the Commission in view of the existing depression in agriculture "to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service * * *".

With respect to rates on agricultural products suffering from depression, the action of the Commission is directed to and limited to such changes "as will promote the freedom of movement" of such products. If freedom of movement already exists, the Resolution does not direct the Commission to make any change.

"Freedom of movement" was therefore a material issue. Indeed, it was the primary issue according to

the Commission's interpretation of the Resolution. If there was freedom of movement under the existing rates, the Commission had no authority under the Resolution to change them, unless they were unreasonable, or discriminatory as measured by the provisions of the Act.

What does the phrase "freedom of movement" mean? Does it mean the free flow of commerce unimpaired by unreasonable or discriminatory rates? Or does it require in addition that the shippers enjoy a profit on their business, notwithstanding that the rates are reasonable and that there has been a steady and unprecedented increase in the transportation of the products, and notwithstanding that the failure of the shipper to realize a profit is due not to something connected with transportation, but to overproduction by the shipper, or to the accidents of business? The latter is the construction put upon the phrase by the Commission. It is submitted that such a construction is erroneous and that the order is therefore void.

As bearing upon the proper interpretation of the Resolution, we quote the following statement made by Representative Rayburn, speaking in the House of Representatives in support of the bill:

> "* * * Freight rates are like tariff taxes in that rates may be set so high that traffic will not move and, therefore, less revenue will be collected than there would be on a lower rate. There is a medium somewhere that is fair to all parties and

that rate should be found if possible, and in the passage of this resolution we hope that the Interstate Commerce Commission may, under its direction, build a rate structure that will be fair and reasonable."

(Cong. Record, Vol. 65, Part 11, Page 11023.)

One of the outstanding facts in this case is the long continued and substantial increase in the movement of deciduous fruits under the rates here under consideration. This is shown by the number of cars moving annually since 1905, as follows (R. 223):

Year	*Total*	*Grapes*
1905	6,326	1,602
1906	5,557	2,052
1907	6,459	3,460
1908	10,719	3,819
1909	13,122	5,880
1910	11,936	4,948
1911	12,539	6,374
1912	13,344	6,357
1913	13,332	6,363
1914	16,146	8,773
1915	16,778	9,563
1916	17,891	9,722
1917	24,628	13,944
1918	27,417	16,358
1919	29,971	19,228
1920	35,246	24,152
1921	40,209	28,419

1922	53,961	41,463
1923	69,777	52,339
1924	66,786	54,775
1925	86,795	71,155
1926	78,803	60,786

The Commission found (R. 38) that there has been "an enormous increase in the tonnage of these fruits". Commissioner McManamy states (R. 65): "The record shows that each year embargoes are placed on grapes at the principal eastern cities because the supply could not be disposed of * * *."

The growth of the deciduous fruit industry in California and the capture of the country's markets by the products of California is also one of the outstanding facts of the case. The States of New York, Pennsylvania and Michigan, the principal competitors of California in fresh grapes, intervened in this case in opposition to the reduction, and their witness V. M. Parshall testified (R. 447):

> "During the past few years shipments of grapes from California have substantially increased in excess of any other representative period; California grapes are the dominating factor in every important market and their distribution covers the entire United States. On the other hand, shipments from eastern states have fluctuated during this period, and, in spite of increased consumption of grapes as a whole in important markets, the shipments from the eastern states to these markets as a whole have not shown any appreciable increase."

The same witness, after pointing out that California has certain advantages over her eastern competitors, particularly in the matter of climate, as a result of which "The California yield per vine is slightly in excess of twice that of New York and Pennsylvania", continues (R. 448):

> "It is not our purpose in this connection that California should be deprived of the natural advantages which she has as to the production of grapes. It is, however, our position that the present rate not only does not deprive California of these natural advantages, but does deprive us of the natural advantage to which we are entitled, that is, proximity to our markets."

Another witness for the eastern growers testified (R. 452) referring to the Chautauqua Erie Grape belt: "There has been no increase in this acreage in twenty years."

We have therefore a steadily increasing transportation of deciduous fruits from California to the East with the resultant capture and domination of the eastern markets by the California product, accompanied by no increase in the eastern production.

The enormous and rapid increase in the acreage devoted to the growing of California deciduous fruits is also made clear in the record. The acreage devoted to grapes increased from 434,907 acres in 1923 to 635,236 acres in 1926, an increase of 46% in three years (R. 64). The Commission found that the pro-

duction of pears, plums and grapes increased in the two year period from 1924 to 1926 as follows (R. 25):

Pears increased.....62%;
Plums increased.....82%;
Grapes increased.....33⅓%.

That the deciduous fruit industry in California is in a state of depression is a fact that is beyond dispute. That many California deciduous fruit growers, principally growers of grapes, are not prosperous is also clear. But those facts alone, viewed in the light of the enormous growth in production, the constant and heavy increase in the shipment of the fruit to the east under these rates, and the capture and domination of the eastern market by the California product, does not show that there is a lack of "freedom of movement". On the contrary, it indicates entire "freedom of movement" and offers no justification whatever for the conclusion that the depression in the California grape industry is due in any respect to any transportation condition. Rather it points to conditions within the industry itself, for which the industry is itself responsible.

The Commission has construed "freedom of movement" to mean that there is no freedom of movement regardless of the fact that cars and commodities move without interruption; it has held that there is not such freedom, though the rate is reasonable, if the growers are not making a profit and are not prosperous. It has measured freedom of movement by

comparing the depressed condition of the fruit industry with the relatively prosperous condition of the carriers and not by any transportation standard.

The matter is discussed in the opinion of the Commission (R. 48):

> "Defendants urge that the charges for transportation have nothing to do with the existing economic conditions in the deciduous-fruit industry. They believe that the proposed reduction would not relieve the growers and claim that there is now entire freedom of movement. In support of this they point to the movement of cars for the past five years as follows:
>
> 1922,.....53,961;
> 1923,.....69,777;
> 1924,.....66,786;
> 1925,.....86,795;
> 1926,.....78,803"

> "According to complainant's view, however, 'freedom of movement' as used in the Hoch-Smith resolution means more than the hauling of an unprecedented volume of traffic. The record establishes that producers are sustaining serious financial loss, that their indebtedness is increasing, that they are finding it difficult to meet taxes, that banks are foreclosing or assuming the management of properties, and that land values have been entirely deflated. Under such conditions complainant contends that freedom of movement does not exist."

This statement of complainant's contention represents the construction of the Resolution by the Com-

mission, and indicates that the Commission considers that there is no "freedom of movement" no matter how many cars or how much fruit actually moves, if the shippers are not making a profit and are sustaining serious financial loss. It is significant that there is in the report and order no direct finding that deciduous fruit is not moving freely. There is only the conclusion that the new rates fixed by the Commission "are necessary *to promote* the freedom of movement by defendants of the specified products of agriculture now affected by existing depression in agriculture."

In the earlier case, *California Growers' & Shippers' Protective League v. Southern Pacific Company*, 100 I. C. C. 79, the Commission found specifically that deciduous fruits were moving freely in interstate commerce under the existing rates (R. 316), finding:

> "The record in this case shows affirmatively that the deciduous fruits here under consideration are moving freely under the present rates, and that the volume of movement has increased greatly during recent years. Complainant's prediction that unless lower rates are secured there will be a substantial reduction in tonnage may not be realized (fols. 491-29). The prediction is based upon the unfavorable financial return to the producers at the time of the hearing, and for a period prior thereto. But this record does not justify the conclusion either that this condition is likely to continue or that it is due in great part to the rate structure. It is suggested in the record that the unfavorable financial results are chargeable in large measure to overproduction, to inability of

> the eastern market to absorb the supply. If this is so, economic laws, and not the rate adjustment, will sooner or later bring about a reduction in the movement, and such reduction would be desirable."

The earlier case showed the figures only through the year 1923. The movement during the succeeding year was slightly less than in 1923, but the 1924 movement amounted to more than 86,000 cars, almost 20,000, or over 20% in excess of 1923. In 1926, the movement was 78,803, almost 10,000 cars in excess of the 1923 movement.

The construction by the Commission that there is no freedom of movement unless the shipper is making a profit is shown to be in error by the legislative history of the Resolution. In its original form as presented to the Senate, the Resolution provided that rates should be fixed "to the end that commerce may freely move with fair profit to the producer and sell at a reasonable price to the consumer" (S. J. R. 107, as amended in the Senate). The provision "with fair profit to the producer and sell at a reasonable price to the consumer" was eliminated before the Resolution was adopted.

Commissioner McManamy in his dissenting opinion expressed what we consider is the proper construction. He says (R. 64):

> "The report discusses freedom of movement, which is another important requirement of the Hoch-Smith Resolution. * * * In 1916 the total

of carload shipments of deciduous fruits from California was 17,891 cars. In 1926 it was 78,803 cars. Of these 9,722 carloads in 1916 and 58,334 carloads in 1926 were grapes. The record shows that each year embargoes were placed on grapes at the principal eastern cities because the supply could not be disposed of and that diversions in search of a market amounted to 1.07 times per car. Surely there is no indication here that freedom of movement has been in any way restricted."

It is submitted that the Commission misconstrued the provision of the resolution respecting "freedom of movement", and that it was in error when it held that there was no freedom of movement notwithstanding the fact that the rates were reasonable, and notwithstanding the fact that there was a continuous and unprecedented increase in the quantities shipped, merely because the shippers were not making a profit. As construed by the Commission, freedom of movement would depend entirely upon the condition of the industry and not upon the fact as to whether cars were actually moving in large and increasing numbers at reasonable rates. It is submitted that this construction is erroneous and the order having been based thereon is invalid.

D. The Commission erroneously construed the Resolution as authorizing it to find without substantial evidence that the existing rate was unreasonable, and that the new rate was the lowest possible lawful rate, and further misconstrued the Resolution as placing upon the carriers the burden of proving that the old rate was the lowest possible lawful rate and that the new rate was lower than the lowest possible lawful rate. The order is arbitrary and invalid since the Resolution does not authorize the Commission to act without substantial evidence and does not alter the existing rule requiring complainant to bear the burden of proof.

As has been shown, the Commission did not attempt to find whether the old rate was reasonable or unreasonable. It considered its duty to be to fix "the lowest possible lawful rate", which it defined to be a rate which in principle must be high enough to cover all of the costs that may fairly be allocated to the service plus at least some margin of profit (R. 26). In the view of the Commission the issue was not whether the old rate was reasonable or was not reasonable; it was rather whether the old rate was the lowest possible lawful rate; if it was not the lowest possible lawful rate, it was of the opinion that the old rate must be reduced until it reached that point.

The Commission therefore set itself the task of determining two issues of fact.

First. Is the existing rate the lowest possible lawful rate?

Second. If it is not, what rate is the lowest possible lawful rate?

With such a theory of its obligations and such a visualization of the issue, the Commission assumed that it was the duty of the carriers to sustain the burden of proof.

To be sure there was much testimony introduced bearing upon the unreasonableness of the existing rate. Complainant introduced evidence to show it was unreasonable; the carriers to show the contrary. But this evidence was directed to an issue which the Commission considered not the real issue in the case.

Thus, in the view that the Commission took of its duty, it was not necessary that there be substantial evidence before it that the existing rate was unreasonable, because it did not deem that an issue. Not being interested in such inquiry, the Commission was unmindful of whether there was or was not evidence on that point.

The evidence on the question of rates introduced by the complainant fell under three general heads:

(1) An analysis and comparison of the rates upon fruits and vegetables that move from California to Eastern defined territories;

(2) A comparison of the existing rates with rates upon other perishable traffic in effect throughout the United States; and

(3) A comparison of the relative increases in rate levels on deciduous fruits and other commodities since June 24, 1928.

We will comment briefly upon the evidence in order to show the Commission's own estimate of its effect and persuasiveness, and to show that the Commission considered that the burden was upon the carriers and not upon the complainant to prove that the existing rates were not the "lowest possible lawful rates" as defined by the Commission.

Comparison with rates on fruit and vegetables.

The comparison of rates upon fruits and vegetables that move from California to eastern defined territories was, at best, inconclusive. The Commission found, after examining the comparison, that the

> "earnings per car on deciduous fruits are higher than on lemons, materially higher than on fresh vegetables and cantaloupes, but lower than on apples and citrus fruits. Considering the length of haul, the net-ton mile earnings on deciduous fruits are relatively higher than on all the other commodities, while the car-mile and gross-ton mile earnings are higher in some instances and lower in others." (R. 32)

This comparison therefore would not in and of itself justify a finding that the deciduous fruit rates were unreasonable, particularly in the face of the clear and uncontroverted testimony of the carriers as to the actual cost of carriage. And whatever it may demonstrate as to the reasonableness of the old rate, it affords no evidence whatever as to the reasonableness, lawfulness or propriety of the new rate. If the earnings from the new rate are compared with the

earnings upon other fruits and vegetables from California, it will be found that, with the exception of cantaloupes, they are lower than for any of the other commodities, and cantaloupes are given a lower rate classification for rate purposes and hence are not comparable.

If the existing rates on deciduous fruits are on the average comparable with the rates existing on other fruits and vegetables from California, such a comparison affords no evidence either that the deciduous-fruit rates are unreasonable, or that they are not the lowest possible lawful rates, particularly in the absence of a showing whether the rates with which the deciduous fruit rates are compared are, or are not, themselves the lowest possible lawful rates. It is recognized that the carriers may voluntarily publish rates which are lower than the rates that can be prescribed by the Commission.

Comparison with rates on bananas and cocoanuts.

The complainant also introduced comparisons with rates on bananas and cocoanuts from Gulf ports to Portland, Seattle, Vancouver, Los Angeles and San Francisco. But the Commission found that the movement, while substantial, was not comparable with the movement of deciduous-fruit from California to the East (R. 33). The carriers showed that the rates on bananas were influenced by the competition of water carriers from Central America. In 1925, 11,150 tons of bananas were imported through Los Angeles and San Francisco Bay ports alone (R. 34).

While under certain circumstances rate comparisons may have probative value for determining the reasonableness of a rate, such comparisons are of no value unless the rates compared exist under substantially similar circumstances. Where rates do not exist under such circumstances, they do not furnish substantial evidence of the unreasonableness of a rate.

Smyth v. Ames, 169 U. S. 466, 540;
Louisville & Nashville Railroad Company v. United States, 238 U. S. 1;
Illinois Cent. R. Co. v. Railroad Commission of Kentucky, 1 Fed. (2nd) 805.

Extension of short-haul rates.

The complainant undertook to extend the various rates on deciduous and other fruits for comparatively short hauls to the transcontinental distance in accordance with a percentage rate of progression employed by the Commission in prescribing a scale on cottonseed cake and meal in another case.

This comparison was in substance rejected by the Commission, which stated (R. 36):

> "The projection of short-haul rates for comparison with those for longer hauls, regardless of the method used, is not a very satisfactory test." and (R. 35)
>
> "Defendants criticize the progression of the scale used in projecting short haul rates, and we think with some merit."

In *Cancellation of Transcontinental Class and Commodity Rates,* 142 I. C. C. 155, the Commission cited

its report herein as authority to show that projections of this character were not proper.

Comparison of relative rate levels.

The other evidence introduced by complainant was what it termed "a comparison of relative rate levels". This comparison showed that the rates on deciduous fruits are 50.4% higher than the June 24, 1918 rates, as compared with a comparative increase on 75 commodities moving east-bound of 29% above the June 24, 1918, basis. But the Commission, in effect, also rejected this testimony, stating (R. 37):

> "Compainant's showing with respect to the percentage increase in the rates on deciduous fruits must be viewed in the light of the fact that in 1911 the rates were made uniform by reductions to the lowest rate, $1.15. The reductions to groups east of Chicago were (fol. 28) from rates as high as $1.50, and the defendants claimed represented efforts on their part to assist in building up the industry in California, situated far from the centers of consumption. The reductions in question were preceded by an increase in the minimum weight from 24,000 to 26,000 pounds. Moreover, at that time from 70 to 80 per cent of the refrigerator cars moved westbound under load."

The Commission also found the following conditions existed which operated to destroy the value of such comparisons:

> (1) "Many of these transcontinental rates were reduced in order to retain or secure traffic which would otherwise move by water"; and

(2) "Other reductions were made to permit specific competitive commodities to move or to reach certain markets" (R. 36);

And the Commission stated further (R. 36):

"The circumstances and conditions surrounding their movement are to that extent dissimilar."

(3) "As to still other reductions, the explanation of the disparity is purely historical, as on lumber, and on petroleum and petroleum products."

(4) "Fresh citrus fruits are now but 35 per cent higher than on June 24, 1918, although the voluntary reduction accorded citrus fruits was accompanied by an increase in minimum weight to 36,000 pounds" (R. 37)

(5) "Carriers claimed 'reductions in deciduous-fruit rates in 1911' represented efforts on their part to assist in building up the industry in California" (R. 37).

(6) In 1911 "from 70 to 80 per cent of the refrigerator cars" moved "westbound under load" (R. 37) in contrast to the 90% empty movement westward now prevailing".

(7) The Commission further stated that the claim of the complainants to a decrease in deciduous-fruit rates based upon the fact that in the readjustment of the increased rates in 1918 and 1920 there was greater increase on deciduous fruits relative to pre-war levels than on other commodities, and that "A similar contention was made and answered adversely in *State of Washington v. Director General,* 58 I. C. C. 701, 706" (R. 37).

Such a comparison furnishes no substantial evidence for finding that the deciduous fruit rates are unreasonable. As the Commission pointed out, the comparison is made with a pre-war deciduous fruit rate which happened to be the lowest on record, made so by the voluntary action of the carrier. No evidence was introduced to show that the pre-war rates on the other commodities, with which comparisons have been made, were reasonable or unreasonable. It also appears that the whole relationship between transcontinental rates existing prior to the war and after the war have been substantially altered by water competition through the Panama Canal and local competition in certain products.

The carriers' showing.

As compared with the complainant's, we find evidence introduced by the carriers which, in every instance, explains and distinguishes the rate comparison suggested and, in every instance, justifies the reasonableness of the rates attacked.

In addition, the carrier introduced evidence of a most persuasive and direct nature as to its actual cost of transporting deciduous fruits. This evidence was accepted by the Commission in its original report, almost without criticism, and in its supplemental report is used as the basis for a statement that the new rates will bring in a return slightly exceeding the carriers' operating expenses. As these operating expenses do not include taxes, rental of

equipment and joint facilities, it is clear that the existing rates cannot do more than cover the full costs.

The Commission's estimate of the evidence.

This in brief was all the evidence before the Commission other than the evidence respecting the depression in the fruit industry. The Commission's own estimate of the effect and persuasiveness of the evidence is shown in its report (R. 58):

> "Considering the relative rates on and earnings of the deciduous-fruit traffic in the light of the condition of the industry and of the service performed by the carriers, and giving due weight to the cost study presented by defendants, we are of the view that the present rates are in excess of the lowest possible lawful rates as herein defined."

The Commission thus definitely set down the factors which it took into consideration in finding that the "present rates are in excess of the lowest possible lawful rates as herein defined". These factors are:

> *First:* The relative rates and earnings of the deciduous fruit traffic in the light of the condition of the industry and the service performed by the carriers; and
>
> *Second:* The cost study presented by the defendants. (The Conrad Study, R. 482.)

These furnished the factual basis for the Commission's decision. What the first one means is rather

difficult to ascertain, and perhaps it was intended to be somewhat vague. The second refers, of course, to the Conrad Cost Study presented by the carriers (R. 482).

In its Report on Further Consideration, the Commission admitted that it had made an error in its computations based on the Conrad Cost Study, of $20.79 per car, and that this amount should have been added to the costs to which it had "given due weight" in arriving at its conclusions. Having admitted its error in its previous consideration of the cost study to which it had "given due weight", the Commission proceeds in its Report on Further Consideration to suggest a few questions respecting the results of the cost study which had not occurred to it when it was laboring under the mistaken belief that the carriers' own cost study furnished substantial evidence that the new rate was above the point of confiscation, and concludes (R. 67):

> "In other words, even if the cost study were accepted without question, it would indicate that the prescribed rates are slightly above the operating expenses and would confirm the impression obtained from comparisons with other rates that the new rates, while probably of less than average profitableness, would still leave the traffic attractive to the carriers."

We have, therefore, in the words just quoted, the Commission's own frank characterization of the effect upon it of the evidence.

First: If the carriers' cost study to which the Commission says it had "given due weight" is accepted without question, it would "indicate" that the new rates are slightly above operating expenses; and

Second: it "would confirm the impression" obtained from comparison with other rates that the new rates were "probably" of less than average profitableness, but would still leave the traffic attractive to the carriers.

Instead of finding upon substantial evidence that the old rates were unreasonable, and the new ones reasonable and the lowest possible lawful rates, the Commission fixed the new rates upon the "indication" that they are "slightly" above operating expenses, and upon an "impression" that they are of "less than average profitableness". No law authorizes the Commission to fix rates upon "indications" or upon "impressions". If the Commission must say of the evidence produced before it, that it merely results in an "impression", there is no substantial evidence upon which the Commission can legally act.

The Commission placed the burden of proof on the carriers.

In the concluding paragraph of the ~~Report on Fur~~ Report on Further Consideration. ~~In his separate contention that~~ the Commission ~~regarded the carriers as carrying opinion~~, he said (R. 69):

> "On the whole record, we adhere to our former finding that the present rates are unreasonable

> and we are not convinced that the rates prescribed are below what are necessary to afford complainants the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

To the same effect are the expressions by Commissioner Eastman in his concurring opinion to the original report, and in his dissenting opinion to the Report on Further Consideration. In his separate concurring opinion, he said (R. 59):

> "While it is by no means clear that the rates in issue are unreasonable and ought to be reduced, complainant is entitled under the Hoch-Smith resolution to the benefit of the doubt, and I can for that reason accept the results reached."

In his dissenting opinion in the second report, Commissioner Eastman said (R. 68):

> "When this case was first decided, I was, as I then indicated in a concurring expression, by no means clear that the rates attacked were unreasonable, but gave complainant the benefit of the doubt because of the Hoch-Smith Resolution."

It is, of course, permissible to refer to concurring or dissenting opinion of Commissioners in interpreting a report of the Commission. *Southern Pacific Company v. Interstate Commerce Commission*, 219 U. S. 433.

The Commission in fixing the new rate upon the basis of "impressions", and because the carriers had not convinced it that the new rates were below the

"lowest possible lawful rates", was not proceeding in accordance with law. Nor was Commissioner Eastman, who in his concurring opinion gave the "benefit of the doubt" to the complainant. The complaint charged that the old rates were in excess of the lowest possible lawful rates. It was incumbent on the complainant to prove that allegation by substantial competent evidence. That could be done even on the Commission's own theory of the meaning of "the lowest possible lawful rate" only by showing the cost of the service. It was not the duty of the carriers to disprove the allegation in advance of some evidence by the complainant in support thereof, and the Commission erred in assuming that the carriers were under the obligation to "convince" it that the prescribed rates were below the irreducible minimum. The burden was not on the carriers; they were not under the duty of "convincing" the Commission. The Commission proceeded upon the legal theory that if the carriers did not sustain the burden of proof, then the Commission was free to fix the rates upon "impressions" gained from the evidence. It is submitted that this finds no support either in the Resolution or the Act and that the order is therefore void.

E. The Commission misconstrued the Resolution in that it held that a rate which yielded the carrier an amount slightly above operating expenses was a lawful rate. The Interstate Commerce Act and the Constitution require that each rate shall yield to the carriers all proper costs and a substantial profit.

The Commission clearly stated (R. 56) that the primary issue before it was whether the existing rate

approached the lowest level of the discretion reposed in it by law. It construed the Resolution to direct it to fix, and it deliberately endeavored to ascertain and fix, the lowest possible rate permitted by the Constitution.

As a preliminary to the discussion of the evidence, it expressed its opinion as to the meaning of the lowest possible rate which it could fix, and stated in clear and unmistakable language that this was the the rate which it was obliged to fix. In this connection we find, in the report of the Commission (R. 27) the following:

> "The resolution is in effect a direction to us to give agricultural commodities affected by depression the lowest rates that it is possible to give without running counter to the provisions of the interstate commerce act and the carriers' rights under the Constitution. Section 1 of the act requires that all rates shall be just and reasonable. What is a reasonable rate? It may be said to be somewhere between *the minimum charge that can be made for the service and permit the carrier to live,* and the maximum charge that can be borne by the shipper * * *."

It quoted its own prior reports as to the purpose of the Resolution and as to its duty thereunder to fix the lowest possible lawful rate, a rate, so the Commission held, which would yield to the carrier a slight return over operating costs (R. 26).

The Commission, having stated that the lowest limit of its discretion in fixing a rate was one which

would return to the carrier some margin of profit, framed the issue thus:

> "* * * whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us." (R. 56)

Its final judgment was that the existing rate was not the lowest possible lawful rate (R. 58). It fixed the new rate as the "lowest possible lawful rate compatible with the maintenance of adequate transportation service" (R. 59).

In its Report on Further Consideration (R. 65) the Commission, correcting an error of $20.79 which it had made in the estimate of certain costs of the carriers for each car in the service involved, reached the conclusion that the sum of $55.91 would be available at the present rates,

> "for taxes, rental of equipment or joint facilities, and interest and this difference would not be eliminated by the prescribed reductions, especially if we assume that the increased minimum load would make some increase in the average revenue per car. In other words, even if the cost study were accepted without question, it would indicate that the prescribed rates *are slightly above the operating expenses* and would confirm the impression obtained from comparisons with other rates that the new rates, while probably of less than average profitableness, would still leave the traffic attractive to the carriers." (R. 67)

The Report of the Commission and its Report on Further Consideration thus established that the Com-

mission believed a rate to be lawful when it returned to the carrier an amount only "slightly above operating expenses". Not only did the Commission express the controlling rule in this form, but it sought to ascertain and fix a rate which would yield to the carriers only a *slight* profit.

It erred in its understanding of the pertinent rule of law. Not only does the Interstate Commerce Act prescribe that rates shall be reasonable, but the carriers are guaranteed by the Constitution the right to establish rates which will yield a substantial profit.

The property of the carriers, although dedicated to a public use, is held in private ownership and is subject only to reasonable control and regulation by the Government.

> "The State is without power to require the traffic covered by the fare enjoined to be carried at a loss or without *substantial* compensation over its proper cost."
>
> *Banton v. Belt Line Railway Corp.*, 268 U. S. 413, 421.

In *Norfolk and Western Railway Company v. West Virginia*, 236 U. S. 605, it was sought by governmental regulation to require a carrier to render a service at a rate which would yield but a slight profit. In that case, 97.4203 per cent of the return to the carrier was consumed by expenses incurred in rendering the service. The margin of two and one-half per cent was held to be so slight that the court regarded the property

of the carrier to have been taken as violation of its constitutional right. The court said, at page 614:

> "It is apparent, from every point of view that this record permits, that the statutory rate at most affords a very narrow margin over the cost of the traffic. It is manifestly not a case where substantial compensation is permitted and where we are asked to enter the domain of the legislative discretion; nor is it one in which it is necessary to determine the value of the property employed in the intrastate business. It is clear that by the reduction in rates the company is forced to carry passengers, if not at or below cost, with merely a nominal reward considering the the volume of the traffic affected. We find no basis whatever upon which the rate can be supported, and it must be concluded, in the light of the principles governing the regulation of rates, that state exceeded its power in opposing it."

In the case of *Northern Pacific Railway Company v. North Dakota*, 236 U. S. 585, decided on the same day as the case of *Norfolk & Western Ry. v. West Virginia*, supra, the Supreme Court affirmed the principle that a rate fixed by governmental authority to be reasonable must accord to the carrier a substantial return upon the property devoted to the particular service. The legislature of North Dakota had fixed certain maximum intrastate rates which carriers might charge. It was sought to justify the statute as a declaration of public policy to aid in the development of a local industry. Mr. Justice Hughes, delivering the opinion of the court, said (598):

"We cannot reach the conclusion that the rate in question is to be supported upon the ground of public policy if, upon the facts found, it should be deemed to be less than reasonable.

"* * * But a different question arises when the state has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or *without substantial compensation*, even though the entire traffic to which the rate is applied is taken into account.

"* * * For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate."

See also

Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 541, 549.

The Commission in this case failed to observe the principles announced in the cases cited. Its conception of the applicable law was that its duty was to fix a rate which would return some profit to the carrier, however slight. If the Commission had properly construed the law and had endeavored to ascertain and fix a rate which would return to the carrier a substantial profit, it seems clear from the report and from its decision in the prior case (100 I. C. C. 79) that the Commission would not have fixed a rate lower than the rate which was attacked in this proceeding.

But whether it be true or not that the Commission regarded the old rate as not inherently unreasonable, the showing that the Commission misconstrued and

misapplied the law applicable to the problem renders the order invalid. It fixed the new rate by the application of an unwarranted construction of the law. Its error is fundamental and the result is an arbitrary and unjustified rate. Even if the court should conclude that there was evidence which justifies the new rate, even if the court should be of the opinion that the new rate is not confiscatory, the court may not correct the error by itself fixing the carriers' rates. Had the Commission been guided by correct legal principles in fixing the new rate, it is impossible to determine what the resultant rate would have been. Obviously it would have fixed a higher rate than it did. The application of a faulty measure of power and duty vitiated the rate fixed beyond the power of a reviewing court to correct, save by annulling the order.

F. The Commission construed the Resolution as authorizing it to regulate industry through the medium of regulating rates, and to base rates not upon the approved and accepted principles of rate making but upon whether the shipper was or was not conducting his business at a profit. Such is not a proper construction of the Resolution, but if it is, the Resolution is unconstitutional as it then constitutes a regulation of industry and not a regulation of commerce.

It has already been shown that the Resolution properly construed did not change the law existing at the time of its enactment and that the Commission in applying it was limited to the standards prescribed in the Intersate Commerce Act. *Anchor Coal Co. v.*

United States, 25 Fed. (2nd) 462. But the Commission thought otherwise. It construed the Resolution in this case as authorizing it to reduce a reasonable rate in order to help the deciduous fruit growers in California.

The Commission in its report, after discussing the depressed condition of the deciduous fruit industry in California, referred to the claim of the complainant that a reduction of the old rates would prove a direct benefit to the producer of deciduous fruit in California (R. 49). After discussing the effect of certain rate reductions upon the prosperity of other industries, the Commission stated (R. 49):

> "Assuming that the reduced rate would not be reflected in reduced selling prices, the reduction here sought, amounting to 29 cents per 100 pounds or $5.80 per ton on the bulk of the traffic, would afford substantial relief to the growers, who bear probably the major portion of charges directly or indirectly, and would mean the difference between a loss and a small profit to many of them."

This clearly indicates that it was the view of the Commission that the reduction in rates, at the expense of the carriers, would accrue to the benefit of the shippers, and would as to many turn their losses into profits.

If the Hoch-Smith Resolution is to be so construed, it is open to serious constitutional objections. Congress under the power to regulate commerce cannot

deprive a carrier of its earnings to be devoted to a purpose not germane to the regulation of commerce.

1. Congress has not given power to fix rates on the basis of regulating business.

Under the Interstate Commerce Act, no power is given the Commission to regulate the policy of business, to encourage weak industries, to give aid to those in need. It has frequently been held that a rate cannot be based upon the reason that it is to the advantage or disadvantage of certain industries or localities.

Thus in

Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42,

Mr. Justice Holmes says:

> "The law does not attempt to equalize fortune, opportunities or abilities."

The Commission itself has declared that:

> "The power has not been lodged with this tribunal to equalize economic advantages, to place one market in competition with another, or to treat all railroads as part of one great whole."
>
> *Ashland Fire Brick Company v. Southern Railway Company*, 22 I. C. C. 115, 121.

In *Northern Pacific Railway Company v. North Dakota*, 236 U. S. 585, 598, Mr. Justice Hughes said:

> "Certainly it could not be said that the carrier may be required to charge excessive rates to some

in order that others may be served at a rate unreasonably low. That would be but arbitrary action."

In *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 541, 553, 555, the court's opinion indicates that it would be wrong to base a rate upon the condition of the lumber business.

In *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, the court set aside an order of the Commission which declared unreasonable an increased rate on lumber. The carrier insisted that, "although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate," yet in effect it "was based upon the assumption by that body of the possession of a power not conferred by law" (p. 443). It also insisted that the order of the Commission was void because it "did not merely exert the power conferred by law to correct an unjust and unreasonable rate", but that it made the order "upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate."

The court held that the Commission's order, in effect, "was based upon the belief by the Commission

that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate" (p. 449). This misinterpretation of its powers rendered void the order resulting from such misinterpretation. The opinion, quoting counsel's characterization of the power exerted, terms it "an abnormal and extraordinary power", and one "which, if it obtained would open a vast field for the exercise of discretion, to the destruction of private property in railroads", one which "would in effect assert public ownership without any of the responsibilities which ownership would imply" (p. 444).

The case was referred to in the case of

Chicago, Rock Island & Pacific Railway Company v. United States, 274 U. S. 29, 33.

Mr. Justice Sutherland says of it:

> "In that case (*S. P. Co. v. Interstate Commerce Commission,* 219 U. S. 443) it appeared upon the face of the record that the commission had not exerted its power to correct an unjust and unreasonable rate, but had made the order complained of upon the theory that it possessed the power to set aside a just and reasonable rate whenever the commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate."

Justice Pitney, in his dissenting opinion, in

Wilson v. New, 243 U. S. 332, 335,

concurred in by Mr. Justice Van Devanter, quotes with approval the opinion in the Willamette Valley case:

> "In *Southern Pacific Co. v. Interstate Com. Comm.,* 219 U. S. 433, 444, reference was made to the unwarranted assertion by the Commission of 'a power which if it obtained would open a vast field for the exercise of discretion, to the destruction of rights of private property in railroads, and would in effect assert public ownership without any of the responsibilities which ownership would imply'."

In the *Assigned Car Cases,* 274 U. S. 564, Mr. Justice McReynolds in his dissenting opinion, claiming that an order of the Commission in regard to car assignments among the coal mines was in excess of the Commission's power, recognized the principle that regulation either of rates or of service must not be based upon the necessities of particular businesses. He says (pp. 585, 587):

> "To me it seems plain enough that the real purpose of the order was not rationally to control distribution of cars during times of shortage, but to force railroads and other large consumers to apportion their purchases of coal among a larger number of producers and thus advantage mines from which such consumers preferred not to buy. Both carrier and large manufacturer

must have steady supplies of suitable coal, and it may be highly important to obtain these from one or a few approved mines. But if such mines are to be denied fuel and private cars during times of shortage, then for their reasonable protection these great consumers probably will endeavor to scatter their orders. * * *

The railroads of the country are private property. They must be operated by their owners according to law under supervision of the Interstate Commerce Commission; but that body is not intrusted with their management and ought not to be permitted to assume it under any guise * * * If, * * * as I must think, the real purpose was to force large consumers to scatter their purchases, the order goes beyond any power entrusted to the Commission."

The majority of the court in the *Assigned Car Cases* sustained the action of the Commission, but they did so on a different interpretation of the Commission's action than that placed upon it by Mr. Justice McReynolds. However, Mr. Justice Brandeis, who delivered the court's opinion, recognizes that the Commission may not, under the guise of regulating carrier instrumentalities, "equalize industrial fortune and opportunity" (274 U. S. at p. 583). But he finds that the object and effect of the rule of the Commission "was not to equalize fortunes but to prevent an unjust discrimination in the use of transportation facilities and to improve the service". There is no difference as to the view that both the

majority of the court and the dissenting Justice held as to the impropriety of regulating economic conditions through the action of a federal commission vested with power to fix just and reasonable rates and to prevent discriminatory practices in the conduct of the carrier's business.

In *United States v. Illinois Central Railroad Company*, 263 U. S. 515, 524, the court says:

> "The law does not attempt to equalize opportunities among localities."

In *Cincinnati, New Orleans and Texas and Pacific Ry. v. Interstate Commerce Commission*, 162 U. S. 184, 221, the court held that the Commission has not the power to reinforce the tariff laws, so as to give protection to American manufacturers and producers from competition by foreign low-priced labor. The tariff laws, said the court, "differ wholly in their objects from the law to regulate commerce. Their main purpose is to collect revenues with which to meet the expenditures of the government" (p. 220). "Moreover, their provisions operate with absolute equality in all parts of the country."

In *McLean Lumber Co. v. United States*, 237 Fed. 460, 470, before Circuit Judge Warrington, and District Judges McCall and Sanford, the court said:

> "* * *It is the duty of the Commission, in passing on the reasonableness of a rate, to consider the

conditions affecting the welfare both of the shippers and the carriers. *Texas Railroad v. Interstate Commission,* 162 U. S. 197, 219 * * *. However, the carrier is not to be denied the right to change from an unreasonably low rate, which has formerly prevailed, to a just and reasonable charge for the future, merely because of the injurious consequences which would arise to shippers from a change in the rate. *Southern Pacific Co. v. Interstate Commission,* 219 U. S. 433, 449 * * *; *Atchison Railroad v. Interstate Commission* (Comm. Ct.) 190 Fed. 591, 594, and 203 Fed. 56, affirmed * * * 231 U. S. 736; and *Rates on Crushed Stone,* 29 I. C. C. 136."

In *Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission,* 190 Fed. 591, the Commerce Court held void an order reducing the rate on lemons. The rate had been reduced to a point at which, in the judgment of the Commission, California growers might successfully compete with their Sicilian competitors in a broader market than would otherwise be possible. "In other words", to quote from the opinion of the Court, "the Commission acted upon the erroneous assumption that it had the power and the right, if not the duty, so to adjust railroad rates as would give to the American industry protection against foreign competition". The court further said:

> "The authority granted it under Section 15 of the act to regulate commerce to prescribe reasonable rates when it shall be of the opinion that the act to regulate commerce to prescribe reason-

does not confer absolute or arbitrary power to act on any consideration which the Commission may deem best for the public, the shippers and the carrier. Its order must be based on transportation considerations * * *.

"As in our judgment the order is based primarily on the assumed authority to protect the industry against foreign competition, it must be held void as beyond the powers delegated to the commission."

The matter was later reopened before the Commission when, after hearing, it found the rate "inherently unreasonable on transportation considerations alone, irrespective of any question of tariff protection." Its action was sustained by the Commerce Court in 203 Fed. 56, affirmed without opinion, 231 U. S. 736.

The repeated declarations by the court to the effect that the purpose of rate-making is not to "equalize fortune or opportunities"; criticisms of action by administrative bodies regulating rates as being taken "for the purpose of equalizing industrial conditions"; the reference to the exercise of such a function as "abnormal", "unprecedented", "extraordinary", "arbitrary action", plainly indicate, what is already clear from the language of the acts regulating interstate commerce, that the granting of aid directly to a "distressed industry", through the agency of rate regulation is forbidden by existing legislation. It is beyond

the power of Congress to enact legislation that would authorize rates to be lowered for the benefit of one industry and that would require the deficit in the income of carriers, necessary to produce the reasonable return to which they are entitled, to be made up by imposition of higher rates upon other industries. To permit such a principle of rate-making would lead government into dangerous experiments and would tend to great injustice and disarrangements in the affairs of industry and agriculture.

2. The power to regulate commerce is subject to the limitations of the Constitution.

The power of Congress to regulate commerce is not absolute, but is subject to the limitations of the Constitution and must be exercised in subordination to the guarantees and limitations of that instrument.

As was said by Justice Brewer in *Monongahela Navigation Company v. United States*, 148 U. S. 312, 336:

> "It cannot be doubted in view of the long list of authorities—for many more might be cited—that Congress has the power in its discretion to compel the removal of this lock and dam as obstructions to the navigation of the river, or to condemn and take them for the purpose of promoting its navigability. In other words, it is within the competency of Congress to make such provision respecting the improvement of the Monongahela

River as in its judgment the public interests demand. Its dominion is supreme.

"But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by that instrument and among them is that of the Fifth Amendment, we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation."

Chief Justice Marshall in *Gibbons v. Ogden,* 9 Wheat. 1, 196, 197, speaking of the power to regulate commerce, says:

"* * * This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. * * * If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States."

In the *Lottery Case,* 188 U. S. 321, 353, the language of Chief Justice Marshall is paraphrased (see also pp. 362, 363).

The same principle is expressed in somewhat different language in

The Employers' Liability Cases, 207 U. S. 463, 502.

Even though an act of Congress be a regulation of commerce.

> "* * * it is void if it conflicts with the provisions of the Fifth Amendment, that no person shall be 'deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation'."

Wilson v. New, 243 U. S. 332, 365, 376, 383;
Adair v. United States, 208 U. S. 160, 180;
United States v. Cress, 243 U. S. 316, 320;
United States v. Lynah, 188 U. S. 445, 465, 471.

3. The construction given the Resolution by the Commission would violate the Fifth Amendment to the Constitution.

If the Hoch-Smith Resolution be construed so as to authorize the earnings of the carriers, their private property, to be taken from them for the purpose of giving a bounty to a private industry, the deciduous fruit growers, it would seem that the provisions of the Fifth Amendment to the Constitution would be violated. The Carriers would be deprived of their

property without compensation for the benefit of other holders of property.

The court has repeatedly condemned legislation of this nature.

Thus in *Loan Association v. Topeka,* 20 Wall 655, statutes of Kansas authorized the issuance of bonds by towns and municipalities for the interest and principal of which the citizens of the towns and municipalities and their property would be liable under the power of taxation. The bonds so issued were, under the statutes referred to, to be used in encouraging private enterprises in the towns and cities affected.

Justice Miller, in delivering the opinion of the court holding the statute unconstitutional and void, employed the strongest possible language of condemnation. At page 664, he says:

> "To lay with one hand the power of the government on the bounty of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

And again, at page 665, referring to the claim that the encouragement of business redounds to the benefit

of the people taxed, he says:

> "* * * If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizen by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

If the Resolution requires the Commission to reduce the earnings of the carrier solely to give the benefit of the reduction to the fruit growers, or other agriculturalists who may be suffering financial loss by reason of the condition of their industry, the evils which Justice Miller pointed out in *Loan Association v. Topeka* will result, and the effect of that decision can scarcely be escaped.

The last named case, it is true, involved an unauthorized exercise of the taxing power by a State, whereas an Act of Congress directing a Commission to reduce the rates charged by carriers privately owned in favor of special industries might involve the question of regulation of commerce. But it must be remembered that the earnings of a carrier are private

property. The "recapture clause" in the Transportation Act of 1920, which was sustained in *Dayton-Goose Creek Railway Company v. United States,* 263 U. S. 456, recognizes that the excess of income over a fair return never becomes the absolute property of the carrier. It gets only the possession and holds such income as trustee for the purposes defined in the Transportation Act. These "trusts" all exist for the direct benefit of the carriers, for the system of transportation generally. But the case would be quite different were the income taken from a carrier to give to private interests, to subsidize weak industries, to aid private citizens laboring under financial disabilities.

It is scarcely necessary to point out that there is a wide difference between the control that the courts may exercise in respect to the action of a body like the Interstate Commerce Commission, which regulates or supervises the conduct of public service businesses, owned and managed by private persons, and the control over officers, boards or commissions dealing with purely governmental functions, like the post office department.

In *Missouri K. & T. R. Co. v. Interstate Commerce Commission,* 164 Fed. 645, 648, it is said by a court composed of Circuit Judges Van Devanter, Hook and Adams:

> "The power conferred upon the commission is at most one merely regulatory of existing vested rights and is therefore quite distinguishable from the powers conferred upon the General Land Office, the Pension Office, and other like departmental bureaus; for the latter are not engaged in administering laws which are regulatory of existing vested rights, but in executing laws relating to the disposal of the public lands of the nation, to the distribution of its bounty, and to other subjects in respect of which the power of Congress is not subject to the constitutional restrictions before named * * *."

The power to grant aid, under the taxing power, to private business was much discussed in connection with the so-called "Sugar bounties" under the Revenue Act of October 1, 1890, commonly called the McKinley Bill.

In *Miles Planting Co. v. Carlisle,* 5 App. Cases, Dist. of Col. 138, 139, Mr. Justice Shepard said:

> "If Congress be conceded the power to grant subsidies from the public revenues to all objects it may deem to be for the general welfare, then it follows that this discretion, like all admitted powers of taxation, is absolute. Such a doctrine would destroy the idea that this is a government of delegated, limited and enumerated powers, render superfluous all the special delegation of power contained in the constitution, and open the way for a flood of socialistic legislation, the specious plea for all of which has ever been the general welfare. It is a doctrine that we cannot subscribe to."

The court believed that the decision in *Loan Association v. Topeka* required the determination that the Act of Congress so far as it established sugar bounties was in violation of the Fifth Amendment. Many decisions of the Supreme Court of the States are cited and quoted.

In *Jones v. City of Portland,* 245 U. S. 217, 221, Justice Day said:

> "* * * It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing powers for merely private purposes is beyond the authority of the State. * * *"

The authority of *Loan Association v. Topeka* was also recognized in *Green v. Frazier,* 253 U. S. 233, 242.

While the question of the validity of the sugar bounties came before the Supreme Court in two cases, it was not necessary in either case for the Court to pass upon the question. The "bounties" were repealed by Congress in 1894.

In *Field v. Clark,* 143 U. S. 649, 694, the bounties clause was attacked under the claim that it rendered the whole tariff act, of which it was a part, invalid. The Court held that if it were unconstitutional, it was so clearly separable from the other parts of the act

that it did not render the act open to attack on this ground.

Again, the Supreme Court had the bounty act before it, incidentally, in

United States v. Realty Company, 163 U. S. 427.

The question there was whether manufacturers of sugar who had done all the acts required to entitle them to the bounties were to be deprived of the bounties by the repeal of the Act of 1890. The Court held that regardless of the invalidity of the act, persons who in good faith had manufactured sugar under the expectation of receiving the bounties had an honorable or moral claim. This claim was recognized by Congress under legislation passed in 1895 for this protection, which was attacked as a gift of public money for unauthorized purposes. The Court held, however, that the Act of Congress was not void as a gift of public moneys for private uses, but was made in discharge of a moral obligation, and that the claimants had demands which the United States in "justice and honor" ought to pay. The Court very properly refused to consider whether the original bounty act was in violation of the Constitution; it rested its opinion upon the assumption that if it were, the government was morally bound to persons who acted on the belief that the law was valid.

Whether the sugar bounty was wholly unconstitutional, as was held by the Supreme Court of the District of Columbia, or whether it may not be within the power granted to Congress, and not reserved to the States or the people, to grant aid directly from the treasury of the United States, raised by taxation, for the purpose of stimulating particular industries which may be deemed of such importance that they should be aided by direct grants of the public moneys, the position of the Commission in the present case goes much further. It imposes a burden upon particular carriers for the benefit of a particular industry, in a particular section of the United States. The equality that necessarily prevails in taxation is set aside, and the carriers are required to contribute several million dollars annually to the deciduous fruit growers. There is no express power granted to Congress to enact legislation so drastic in its interference with property rights, or so subversive of fundamental principles of equality, and it cannot be sustained as incidental to the power to regulate commerce. As Justice Day says in his dissenting opinion in

Wilson v. New, 243 U. S. 332, 367,

> "The underlying principle of the decisions which have constrained this court in rare instances to exercise its constitutional right to declare congressional enactments void, is the protection intended to be afforded against legislation of an arbitrary character."

That the right to receive just compensation is a fundamental right of property has been frequently recognized.

In *Minnesota Rate Cases,* 230 U. S. 352, 433, the court said:

> "The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is engaged—which private exigency may not be permitted to ignore—that these shall not be an exorbitant charge for the service rendered. But the State has not seen fit to undertake the service itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title but to right to receive just compensation for the service given to the public. * * *"

And in *Wilson v. New,* 243 U. S. 332, 386, Justice Pitney, in a dissenting opinion concurred in by Mr. Justice Van Devanter, says,

> "* * * The devotion of their (the carriers') property to the public use does not give to the public an interest in the property, but only in its use."

He points out further that the carrier's right of property is not "mere ownership and the privilege of receiving a limited return from its use," but there

are other rights involved, such as "the right to put it at risk in business, and by legitimate skill and enterprise to make gains beyond the fixed rates of interest."

Even if the new rate were not confiscatory, it would be beyond the legislative power to reduce a rate solely for the purpose of stimulating weakened industries, or to subsidize them through the guise of regulating rates. The carriers in the present case are forbidden to earn a rate, not "inherently unreasonable" (203 Fed. 56, 57), to use the expression of Judge Mack, because a number of deciduous fruit growers, by reason of over-production of wine grapes, or for other causes, are in financial distress. The situation is not unlike that involved in *Loan Association v. Topeka,* supra, with the additional difficulty that the government is not using the taxing power for private uses, but "is employing its power to take the carrier's private earnings to benefit a special class of persons". Suppose that the question was as to the surplus "recaptured" in the *Dayton-Goose Creek case* for the benefit of the railroad. Would it be within the constitutional powers of Congress to direct that such surplus should be used to pay the cost of transportation on the lines of the Dayton-Goose Creek Railway Company of those who desired to be carried as passengers, but did not have the fare, or to devote it to any use, however meritorious, not connected with the regulation of commerce?

Under our constitutional system, the sovereign power does not extend to the taking of property law-

fully owned, or the lawful profits of property, from one person or group of persons for the advantage of other persons or groups. The imposition upon carriers of the burden of promoting the general welfare is unlike the operation of the post office or other governmental activity, carried on for the public where deficits may be made good from taxation or other revenues in the public treasury. Those ultimately pay who share the conveniences. Even the "common benefit" to the whole community may not be served "at the expense of a single class. The equal protection of the laws—the spirit of common justice—forbids that one class should by law be compelled to suffer loss in order that others may make gain." (Brewer, J., in *Reagan v. Farmers' Loan and Trust Company*, 154 U. S. 362, 410.)

4. The power to regulate commerce does not include the power to grant aid to industry.

It is a commonplace of constitutional law that production is not commerce, that the latter word has to deal with buying, selling or transporting goods, not with making, or growing or mining them.

In *United Mine Workers of America v. Coronado Coal Company*, 259 U. S. 344, 407, Mr. Chief Justice Taft said:

> "Coal mining is not interstate commerce, and and the power of Congress does not extend to its regulation as such,"

and in *Hammer v. Dagenhart*, 247 U. S. 251, 272, Justice Day said:

"* * * The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce make their production a part thereof."

See also

United States v. E. C. Knight Company, 156 U. S. 1, 12, 13, 34;

Kidd v. Pearson, 128 U. S. 1, 20-22;

Coe v. Errol, 116 U. S. 517, 525;

Veazie v. Moor, 14 How. 568, 574.

Neither mining nor manufacturing is interstate commerce, and "its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements and persists even though the business be conducted in close connection with interstate commerce."

Oliver Iron Milling Company v. Lord, 262 U. S. 172, 178 (per Van Devanter, J.).

See also

Crescent Cotton Oil Company v. Mississippi, 257 U. S. 129, 136;

Arkadelphia Co. v. St. Louis Southwestern Railway Company, 249 U. S. 134, 148-152;

McCluskey v. Marysville & Northern Railway Company, 243 U. S. 36;

Delaware, Lackawanna & Western Railroad Company v. Yurkonis, 238 U. S. 439, 444-445;

In *Heisler v. Thomas Colliery Company,* 260 U. S. 245, the exemption from state taxation was claimed for the anthracite coal mined in Pennsylvania, on the ground that the state tax was a burden on interstate commerce. Justice McKenna, in rejecting this contention, said:

> "The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty of exportation of a product or article from a state determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof', wool yet unshorn and coal yet unmined, because they are in varying percentages destined for and surely to be exported to states other than those of their production."

The "federal commercial control", which the court rejected in the *Heisler case,* the Commission has adopted in the present case. Reducing transportation rates on their products to encourage the business of the deciduous fruit growers at the expense of the

railroads has as little justification as granting an exemption from state taxation of such products under the commerce clause.

If it be said that the regulation of rates is an exercise of sovereign power, that the motive of Congress could not be inquired into, the answer is that the power, and, moreover, the court has annulled acts of Congress because they seek to attain a forbidden end through a permitted power.

Child Labor Tax Case, 259 U. S. 20;
Hill v. Wallace, 259 U. S. 44.

If the control of the operations involved in the processes of manufacture is beyond the power of Congress, under the grant in the commerce clause, it must equally follow that the granting of special privileges to certain industries or productive activities is equally outside the power to regulate commerce. To be sure, the legislative power may in the regulation of commerce fix rates for transportation that are just and reasonable; it may prevent discrimination; it may assume a control over transportation, the limits of which are not precisely fixed, but which permit it wide discretion. Where the roads are privately owned, the right of the carrier to his earnings and to the enjoyment of the advantages which he possesses cannot be wrested from him by a direction of the government that he should not continue to receive the existing rates for his service, not because they are

unreasonable, but because it is desirable to encourage certain industries by giving them lower rates.

Though it has been held that the grant of the power to regulate commerce may include the power to prohibit the transportation of harmful things, like lottery tickets, it has never been held that it authorizes the granting of what are in effect bounties to industries needing encouragement. Congress may, no doubt, build roads or canals.

California v. Central Pacific Railroad Co., 127 U. S. 1, 39;
Wilson v. Shaw, 204 U. S. 24, 33.

It may exert affirmative control over privately owned railroads to see that such railroads are equipped to perform, and do perform the requisite public service.

Dayton-Goose Creek Railway Company v. United States, 263 U. S. 456, 497.

But regulation of commerce must be confined to commerce itself; it cannot reach out to matters that are not commerce, though they may ultimately result in commerce. It is conceded, for example, that Congress may not "control the mere acquisition of stock in a state corporation engaged in interstate commerce".

Northern Securities Company v. United States, 193 U. S. 197, 334,

though it may declare "combinations in restraint of commerce" illegal.

Loewe v. Lawlor, 208 U. S. 274.

The regulation must have some immediate end dealing with commerce. The essential nature of our government forbids the invasion of the productive activities existing in the states.

License Tax cases, 5 Wall. 462, 471.

"The power to regulate commerce," says the court in *Adair v. United States,* 208 U. S. 161, 177, "is the power to prescribe rules by which such commerce must be governed". But in order that the rule may be justified under the grant in the commerce clause, there must be "a substantial connection between the object sought to be attained by the act and the means provided to accomplish that object".

"Any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated" (208 U. S., p. 178).

In that case, notwithstanding "that some of the relations of railroads with unions of railroad employees are closely enough connected with commerce to justify legislation by Congress" (208 U. S. 190), the Erdman Act forbidding, under penalties, a carrier engaged in interstate commerce from discharging an employee because of his membership in a labor union, was held to be beyond the power of Congress to enact.

If Congress under the power of regulation of interstate commerce should be held to have the power to aid depressed industries by granting rates that will encourage them, the states must have the same power with respect to intrastate commerce. The extent of the power would be limitless.

Though the "affirmative power of Congress in developing interstate commerce agencies is clear" (Taft, C. J. in *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company*, 257 U. S. at p. 590) and though "the authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on" (Hughes, J., in *The Minnesota Rate cases*, 230 U. S. at p. 399), it has never been supposed that its power extends to establishing a protective tariff or a system of bounties for "distressed industries", or to reach into the states for the purpose of encouraging business that thereby interstate commerce may perhaps ultimately be increased.

Analogous to the situation involved in the manufacture or preparation of the goods are the cases where goods are shipped from one state to another under a contract whereby the seller is to perform some acts regarding them, such, for example, as setting in place complicated machinery. At what point does commerce end, when the goods are delivered at the end of their transportation, or when they are placed in the final position for use? May, for example, the

state of destination regulate or interfere with the performance of a contract involving construction work?

York Manufacturing Company v. Colley, 247 U. S. 21; and

Kansas City Structural Steel Company v. Arkansas, 269 U. S. 148;

indicate the difficulties, and it is not necessary to enter into them in this connection. But the cases which hold the construction work to be interstate commerce, and those which hold it to be intrastate commerce agree that the regulation of interstate commerce does not extend to things that have wholly passed out of commerce, and into the permanent dominion of the State's sphere of sovereignty. There would be no boundary line, no twilight zone, if the view that the Commission took in the present case concerning the Hoch-Smith Resolution were to prevail that it authorized the encouragement of agriculture by the Commission fixing lower rates for transportation of the products of the farm, orchard and vineyard.

5. Where doubts as to constitutional power are raised by one construction of a statute, the Court should, if possible, construe it so as to avoid the constitutional question.

In view of the difficulties of sustaining the Hoch-Smith Resolution as a valid exercise of the powers granted to Congress, if it be construed as a positive mandate to the Commission in every rate case involv-

ing agricultural products, to reduce those rates, though not inherently unreasonable or unfair, to the lowest possible lawful rates, an interpretation that avoids those difficulties should be adopted. This has been done in many cases. Thus, in the case of *Texas v. Eastern Texas Railroad Company*, 258 U. S. 204, the question was whether under the Transportation Act of 1920, an order of the Interstate Commerce Commission provided for in that Act, sanctioning the abandonment of the operation of a railroad, should be interpreted as authorizing the entire abandonment of a railroad wholly intrastate in its operations. Mr. Justice Van Devanter at p. 217 of the opinion thus states the case:

> "If paragraphs 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. Of such a situation this court has said, 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.' *(United States v. Delaware and Hudson Company*, 213 U. S. 366, 407-408.)
>
> "Although found in the Transportation Act, these paragraphs are amendments of the Interstate Commerce Act and are so styled. They contain some broad language, but do not plainly or certainly show that they are intended to provide for the complete abandonment of a road like the

one we have described * * *. As a whole these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulation of interstate commerce, save such as is involved in the rightful exertion of the power of congress over interstate and foreign commerce (*Minnesota Rate Case*, 230 U. S. 352, 418; *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563). And had there been a purpose here to depart from the accustomed path and to deal with intrastate commerce as such independently of any effect on interstate and foreign commerce, it is but reasonable to believe that that purpose would have been very plainly declared."

The language is very pertinent to the construction that should be given the Resolution.

In *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 422, the court expresses its duty not only "to construe the statute not merely so as to sustain its constitutionality but so as to avoid a succession of constitutional doubts, so far as candor permits" (per Holmes, J., at p. 422).

This is illustrated in many other cases:

The Abby Dodge, 223 U. S. 166, 175;

United States v. Delaware and Hudson Company, 213 U. S. 366, 407;

Knights Templars' & Masons' Life Indemnity Company v. Jarman, 187 U. S. 197, 205;

McCullough v. Virginia, 172 U. S. 102, 112;
United States v. Coombs, 12 Pet. 72, 76;
Employers' Liability Cases, 207 U. S. 463, 509-519.

The constitutional difficulties that are presented by the construction given to the Hoch-Smith Resolution by the Commission, require the application of this familiar principle.

Interpreted as a general mandate to undertake a complete investigation of the rate structure of the country, these difficulties are avoided. Interpreted as it has been in the present case, the Hoch-Smith Resolution is beyond the power of Congress to regulate commerce conferred by the constitution and results in an interference with private property that brings it within the prohibition of the Fifth Amendment.

G. The Commission misconstrued the Resolution in that it applied it in an isolated proceeding involving a rate on a particular commodity from a single state, while the Resolution is intended to be applied only in a general investigation into the general rate structure of the country.

The order of the Commission was made in a proceeding instituted after the Resolution became effective. By it, the shippers sought to set aside a single rate and to obtain a lower one for the particular class of commodities involved. The proceeding was initiated by a complaint of the shippers pursuant to Section 15 of the Interstate Commerce Act. Though various parties intervened, in each order permitting inter-

vention, the Commission expressly asserted the condition that the permission to intervene should not be construed to allow the Intervener to introduce evidence which would unduly broaden the issues raised in the complaint (R. 150-153).

Properly construed, the Hoch-Smith Resolution is not applicable to such a proceeding. With the exception of cases pending before the Commission at the time of the adoption of the Resolution, of which the Resolution makes particular mention, the Resolution is directed only to a proceeding initiated by the Commission pursuant to the mandate of the Resolution directing a general and comprehensive investigation of the rate structure of the country.

Not only is it clear from the language of the Resolution, but also from the title of the Resolution, its legislative history and its previous construction by the Commission, the administrative body charged with its enforcement, that the Resolution was intended to provide for a general examination of the rate structure and not to apply to proceedings initiated by complaint concerning a particular rate. Such an interpretation is consistent with the spirit and purpose of the Resolution; any other interpretation would do violence to the purpose of the Resolution and would aggravate the very evils against which it was directed.

1. The title of the Resolution.

The title of the Resolution is as follows:

> "Joint Resolution Directing the Interstate Commerce Commission to take action relative to

adjustments in the rate structure of common carriers subject to the Interstate Commerce Act, and the fixing of rates and charges."

The direction is to the Commission to take action, not to await complaints of shippers and others. It directs the Commission to take such action with reference to "the rate structure of common carriers", not with reference to particular rates. The very form, a Joint Resolution, indicates that Congress was issuing a direction to a subordinate agency of government, not that it was legislating concerning rights and duties.

The court has often resorted to the titles of laws in arriving at the intention of the legislative power.

United States v. Katz, 271 U. S. 354, 357;
Knowlton v. Moore, 178 U. S. 41, 65;
Church of the Holy Trinity v. United States, 143 U. S. 457, 462.

2. The language of the Resolution.

The first paragraph of the Resolution is merely a warning to the Commission that in the fixing of rates, it should consider the conditions prevailing in the industries involved to the end of encouraging the free movement of commodities. With this, which is nothing new in rate making, we need not be concerned. The second paragraph of the Resolution contains a direct order to the Commission to "make a thorough investigation of the rate structure of common carriers subject to the Interstate Commerce Act", to ascer-

tain whether undue burdens were thereby imposed or undue preferences thereby given "as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities", and to correct all such defects when found. The Commission is further directed that, in making any such change, it should give due regard to "the general and comparative levels in market value of the various classes and kinds of commodities over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation". The Commission is further directed to make such changes from time to time as it might find appropriate *"on the record then made"* to place rates upon a "just and reasonable basis *with relation to other rates"*. The third paragraph is directed especially to agricultural commodities and the Commission is directed thereby to give its first attention to agricultural commodities and to make with the least practicable delay "such lawful changes in the rate structrue of the country as will promote the freedom of movement by common carriers of the products of agriculture * * * at the lowest possible lawful rates compatible with the maintenance of adequate transportation service".

These two paragraphs of the Resolution leave no doubt that it applied only to a general investigation of the country's rate structure, ordered to be undertaken by the Commission. That such an investigation was ordered is clear. It is equally clear that the

directions contained in the Resolution could be carried out only in a general investigation. How, except in such a proceeding, would it be possible to give due regard to the general and comparative levels in market value of the various classes and kinds of commodities over a reasonable period of years? In the present proceeding no attempt was made to comply with this provision of the Resolution, and such attempt would have been impossible of achievement. How, except in a general rate investigation, would it be possible to give due regard to the development of the country as a whole? No opportunity is presented in a proceeding involving a single rate to make a comprehensive survey of the general rate structure or the conditions prevailing in the various parts of the country, and no attempt was made to do so in the present proceeding. How, except in a general investigation could due regard be given to the maintenance of an adequate transportation service? In a proceeding concerning a single rate instituted by a complaint of shippers, no opportunity presents itself to accord to the railroads such readjustment of its other rates as might be required by a lowering of the rate on the commodity involved.

The instructions to the Commission contained in the third paragraph are susceptible of being complied with only in a general investigation. The third paragraph of the Resolution does not refer to any new policy in rate making; it directs not that changes shall be made in rates, but in the rate structure of the

country. The rate structure of the country is not involved in any proceeding save the general investigation ordered by the Resolution. The third paragraph directs that any changes made in the rate structure shall be compatible with the maintenance of adequate transportation service. Adequate transportation service requires that the whole rate structure of the country shall be so adjusted as to afford to the carriers adequate income, and such an adequate income can only be secured and protected after general investigation. In short, the third paragraph of the Resolution is only a direction to give prompt attention in the general investigation, to agriculture which was then suffering from depression.

3. The legislative history shows the same Congressional intention.

The report of the Committee of the House on Interstate and Foreign Commerce, and the speeches of Representative Hoch in support of the Resolution, made it clear that Congress was of the opinion that the general rate structure of the country was out of adjustment, a condition aggravated by various blanket increases and decreases which had taken place during and after the war period, and that various localities and classes of commodities were bearing an undue proportion of the rate burden of the country. Among other things this committee reported as follows:

> "This resolution is based upon the proposition that the present freight structure is out of ad-

justment, and that certain commodities, particularly agricultural products, are, in general, bearing an unfair proportion of the freight burden.

* * * * * * *

"The resolution does not propose that Congress enter upon the technical job of rate making, but directs the Interstate Commerce Commission to proceed upon the inquiry and to remove as far as possible the injustices and maladjustments that now exist."

(Report No. 735, House Committee on Interstate and Foreign Commerce, May 13, 1924.)

This report called attention to the maladjustment of the rate structure caused by varying conditions and flat horizontal increases in the freight rates and to the fact that "this improper distribution of the freight burden has borne particularly heavily on the products of the farm owing to the price deflation in those products".

Mr. Hoch, one of the authors of the Resolution stated (Cong. Rec., Vol. 65, Part 11, Page 11026):

"The gentleman said the statement was made by Mr. Hardie, director of traffic of the Interstate Commerce Commission, that this investigation might take as much as 10 years. If you will turn over a few pages of the hearing, the gentleman knows very well that he will find and you will find that Mr. Hardie said that in the final survey when you get down to the last detail of its application it might possibly be as much as 10 years, but he also said that under this general survey, in his judgment, you could get substantial results inside of two or three years; and,

obviously, before we can make the adjustments we have to make this investigation. * * *"

Mr. Hoch summarized the Resolution by stating:

"* * * The main part of this resolution is in paragraph I. Nobody contends that this can be done at once. * * * The second paragraph is an honest direction to the commission, calling attention to the agricultural depression and directing every possible relief, reasonable and lawful, at the earliest possible date."

The Committee of the House stated that the Resolution was based upon the desire for a general investigation, for equalization of the burden of the freight rates of the country, and for prompt attention to the rates on agricultural products. The author of the bill did not anticipate that any action under the Resolution would be taken by the Commission other than in a general investigation, but specifically stated that the adjustment could not be made until the general investigation directed by the Resolution had been undertaken and sufficient progress made therein to determine the relation of rates on agricultural products to the balance of the rate structure.

4. Restricted scope of previous investigations by Commission.

Under the Interstate Commerce Act as originally enacted the Commission had no power to initiate rates but its power was confined to passing upon the reasonableness and propriety of only such rates as were challenged by complaints filed with it.

Later the Commission was given the power to suspend tariffs filed by carriers proposing advances in rates and to initiate an inquiry into the reasonableness and propriety of the proposal. This early experience apparently had the effect of creating more or less a habit of mind in the Commission to deal with individual rates and relatively minor rate adjustments rather than with comprehensive reviews of entire rate structures, and this habit of mind continued after the power of the Commission was broadened by amendments to the Act permitting it to enter of its own motion into inquiries of the latter scope.

Prior to the enactment of the Hoch-Smith Resolution the Commission had never entered upon a rate investigation of nation-wide scope except in the single instance involving the general rate increases authorized by *Ex Parte 74, Increased Rates,* 1920, 58 I. C. C. 220. That proceeding was an emergency one and for the sole purpose of inquiring into the revenue needs of the carriers and providing the necessary general increases in rates to meet them. It did not involve an inquiry into the rates themselves or a consideration of the relative levels of rates in different sections of the country or on different commodities.

While it is true that the Commission had initiated several so-called general investigations, these were either confined to the rates on particular commodities or to particular territories, such as the *Midcontinent Oil Rates* (112 I. C. C. 421; 132 I. C. C. 103), *Western*

Cement Rates (69 I. C. C. 644), *Sugar Cases of 1922* (81 I. C. C. 448), *Rates to Southwestern Destinations* (95 I. C. C. 188) and *Southern Class Rate Investigation* (100 I. C. C. 513). Generally these investigations resulted merely from the consolidation of numerous individual cases before the Commission, or a consolidation of such pending cases and a broadening of the issues through an order of investigation accompanying their consolidation.

It is evident from the legislative history of the Resolution that it was this tendency of the Commission to deal with rates in a more or less piecemeal way that the Hoch-Smith Resolution was intended to correct. It gave no new powers to the Commission with respect to rates and prescribed no new rules of law, but merely directed the Commission as to the manner in which it should proceed to the exercise of power already possessed by it under the law already in effect.

5. The Commission construed the Resolution as a mandate for a general survey.

On March 12, 1925, the Commission issued a General Order instituting an investigation of the rate structure of common carriers subject to the Interstate Commerce Act. This proceeding is known as Docket No. 17000. To use the words of the Commission,

> "Briefly summarized, the purpose of this investigation is to comply with the joint resolution

> in order to determine the extent and manner in which the rate structure of common carriers subject to the interstate commerce act is in any respect unlawful, and to make in accordance with law such changes, adjustments, and redistribution in that rate structure as may be necessary to correct any defects found to exist." (R. 518)

Thereafter, in the course of the proceeding, carriers in the western district applied for increases in freight rates generally averaging five per cent. This application known as Ex Parte 87 was consolidated with Docket No. 17000, and, in passing upon the application, the Commission said:

> "Full information as to what the rates now are, and what would constitute reasonable rates, is necessary before action may be taken prescribing reasonable and non-prejudicial rates, in view of the terms of the resolution requiring us so to readjust rates as to bring about fair relations between particular sections, competing points, and traffic. * * * The earnings of carriers in the western district, as a whole, have not been such as to warrant us on the record as it stands to-day in making any general downward revision of rates on products of agriculture, or of other industries subject to depression. The record does, however, present much information which bears directly on the task imposed upon us by the resolution, and it is our purpose to attempt to obtain further information necessary to enable us to determine what, if any, readjustments should be made as between commodities or in furtherance of the rectification of the rate structure as between particular points and districts. Our conclusions are without prejudice to the determination of the

issues in No. 17,000 and No. 15,686 upon the consolidated record."

Revenues in Western District, 113 I. C. C. 3, 39.

The Commission thus clearly recognized that its action under the Resolution could be only by a general proceeding.

It is significant that in its order in the earlier proceeding finding these rates not unreasonable, and dismissing the complaint, the Commission concluded (R. 317):

> "We find that the rates assailed as a whole are not unreasonable or unduly prejudicial as alleged. This finding is without prejudice to any conclusion which may be reached upon the later and more comprehensive record concerning the relation of railroad rates to agriculture which is expected to be developed in Docket No. 17000."

The earlier case was pending at the time the Resolution became effective, and under the provision of the Resolution, was to be determined by its terms. Having found the rate reasonable, the Commission specifically preserved the right to consider the rates in connection with the General Rate Investigation (Docket No. 17000) which had already been instituted pursuant to the mandate of the Resolution.

6. Application of the Resolution in a proceeding involving an isolated rate will defeat the intention of Congress.

The evil which is sought to be corrected is the supposed mal-adjustment among rates now existing. If it is open to any shipper (in the absence of a showing that it is unreasonable under Section 1 of the Interstate Commerce Act) to secure a reduction of his rate, irrespective of its effect upon other rates, and without an inquiry and investigation by the Commission as to what that result will be, the Resolution will be used to perpetuate and increase the evil which it sought to correct.

Immediately following the making of the order in this case, the grape growers of New York filed a complaint with the Commission asking for a reduction in their rates, alleging, among other grounds, undue preference to California, a depression in their industry by reason of the very rate reduction which is the subject of this inquiry and, after the hearing, the Commssion reduced the rate, basing its order, in part, upon the fact that the reduced rates from California constituted a discrimination.

> *Chautauqua & Erie Grape Growers' Cooperative Association v. Erie Railroad Company,* 146 I. C. C. 403.

The vicious circle created by making rates dependent upon any fact other than their reasonableness, illustrated by the last mentioned ruling, the *Lake Cargo Coal case,* supra, and *Georgia Peach Growers v. Alabama Ry.,* 139 I. C. C. 143, will continue, if the

Resolution is to be applied in separate proceedings. The change in conditions produced by the initial rate change, will result in mal-adjustments calling for further rate proceedings, and the erection of a new rate structure will be carried out piece-meal—the very evil for the correction of which the Resolution was enacted. Revenues of the carriers will be depleted by rate reductions for depressed industries, in favor of the first to rush in to secure relief. Later applicants would be faced with the reduced revenues of the carriers, and reductions in rates that otherwise would have been made will be denied because of the requirement of the Resolution that adequate transportation facilities be maintained and because the revenues of the carriers are insufficient to justify further decreases.

In connection with the comprehensive and general survey of the rate structure directed by the Resolution there is no reason why the Commission may not make appropriate orders applicable to particular commodities from time to time, but every argument of reason and convenience is against making it available as the basis of a complaint filed by a single group of shippers to reduce a rate on a single commodity produced in a single state. Not only is reason and convenience against such a construction of the Resolution, but such a construction would violate the plain terms of the Resolution, particularly when read in the light of its congressional history.

II. The rate fixed is confiscatory and violates the Interstate Commerce Act and the Constitution. The Commission intended to fix a rate that would not yield a substantial return, and did, in fact, fix a rate which does not cover the carriers' costs or yield a substantial return.

The new rates fixed by the Commission are confiscatory. They not only do not yield the carrier a substantial return over all proper costs, but such costs will actually exceed revenues by not less than $2.99 per car. If this contention is proved, the order is, of course, void, for the Commission and Congress are without power to deprive the carriers of their property by fixing confiscatory rates.

The question of confiscation is separate and independent of the issues already discussed. Those issues have to do with the question as to whether the Commission properly interpreted and applied the Resolution and the Act. The question of confiscation, on the other hand, arises under the Constitution itself and requires the independent judgment of this Court upon the questions of law and fact in issue. The order of the Commission is not conclusive upon this Court upon this question, even though it were supported by substantial evidence. While the rates fixed by the Commission are *prima facie* reasonable, this Court will, itself, examine the facts and the law, and, on its own independent judgment, decide whether the rate fixed is or is not confiscatory.

Ohio Valley Water Company v. Ben Avon Borough, 253 U. S. 287;

Prentis v. Atlantic Coast Line Company, 211 U. S. 210.

The petition alleges that the carriers' costs will amount on the average to not less than $470.06 for each car of deciduous fruit transported, while the average revenue under the new rate per car will not exceed $467.07, thus leaving a deficit of not less than $2.99 per car (R. 9). The new rates, it is alleged, will entail an actual loss to the carriers of more than $240,000 per annum, and will not allow for any profit (R. 9). In its answer, the Intervener denies that the average cost is $470.06 per car as alleged by the carrier, and alleges that the average revenue will be $480 per car (R. 89). Issues of fact, both as to revenue and as to cost, are thus raised which must be judicially reviewed. It is submitted that the uncontradicted evidence before the Commission shows that the rate is confiscatory, and that the findings of the Commission in its report sustain the carriers' contention.

1. A rate is confiscatory unless it allows the Carrier a substantial profit.

The Commission, in interpreting the requirement of the Hoch-Smith Resolution that the rates fixed shall be "lawful", stated that a "lawful" rate was one which "in principle" must be high enough to cover all the costs that may fairly be allocated to the service, plus at least some margin of profit (R. 26). From this interpretation, as well as an examination of the report as a whole, it is evident that the Commission considered a rate lawful, and not confiscatory, if it produced "slightly above the operating expenses" (R. 67).

This construction is erroneous. Rates which produce revenue only slightly in excess of the operating expenses are confiscatory and void.

The carriers are entitled to rates which will yield them their costs of service and substantial compensation in addition.

> "The state is without power to require the traffic covered by the fare enjoined to be carried at a loss or without substantial compensation over its proper costs."
>
> *Banton v. Belt Line Railway Corp.*, 268 U. S. 413.

In *Norfolk and Western Railway Company v. West Virginia*, 236 U. S. 605, Mr. Justice Hughes, in an opinion holding a passenger rate of 2¢ per mile fixed by an act of the West Virginia Legislature to be void, said:

> "It is apparent, from every point of view that this record permits, that the statutory rate at most affords a very narrow margin over the cost of the traffic. It is manifestly not a case where substantial compensation is permitted and where we are asked to enter the domain of the legislative discretion; nor is it one in which it is necessary to determine the value of the property employed in intrastafe business."

The view at one time urged, that if a rate returned the carrier the out-of-pocket operating expenses, incident to the particular traffic, it was not confiscatory, if the carrier earned a reasonable return upon its

property as a whole, has been definitely overruled. It is well settled that each rate must yield not only the out-of-pocket costs incurred by the particular traffic, but a just proportion of the expenses incurred for all traffic of which it forms a part, and in addition yield a substantial profit.

As was said in the *Banton case* (*Banton v. Belt Line Railway Corp.*, 268 U. S. 413), the cost of service

> "includes not only the expenditures, if any, incurred exclusively for that traffic, but also a just proportion of the expenses incurred for all traffic of which that in question forms a part."

In *Northern Pacific Railway Company v. North Dakota*, 236 U. S. 585, 597, the correct rule is stated by Mr. Justice Hughes to be:

> "The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned."

To escape being confiscatory, therefore, a rate must pay all direct costs, a reasonable apportionment of all general costs, and in addition a substantial profit.

While it is indisputable that a carrier is entitled to earn a substantial return on each rate in excess of all proper costs, the carrier is not entitled to earn exactly the same percentage of return on all the various classes of traffic. The "substantial return" for one

class may be less in proportion than the "substantial return" required on another class of traffic. Depending upon various considerations, such as the value of the service to the shipper, the value of the product carried, and other factors, the rate of return on one class of traffic may be less or greater than on others, provided always that the rate yields to the carrier a substantial return in excess of all proper costs.

But a rate may not be reduced below the point where it will return a substantial profit, even though the State or a regulatory body may consider it sound public policy to do so. In the case of *Northern Pacific v. North Dakota,* supra, where a rate was held to be confiscatory and void, Mr. Justice Hughes, speaking for the court, said (p. 598):

> "The state insists that the enactment of the statute may be justified as 'a declaration of public policy'. In substance, the argument is that the rate was imposed to aid in the development of a local industry and thus to confer a benefit upon the people of the State * * *. But, while local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the State may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. * * * It does not aid the argument to urge that the State may permit the carrier to make good its loss by charges for other transportation. * * * Certainly, it could not be said that the carrier may be required to

charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action. We cannot reach the conclusion that the rate in question is to be supported upon the ground of public policy if, upon the facts found, it should be deemed to be less than reasonable."

These principles, applied to the instant case, require that the rates for agricultural products, including deciduous fruits, must be reasonable rates and must return a substantial profit. The fact that the agricultural industry may be suffering from depression, or that Congress may consider as a matter of public policy that the rates on agricultural products should be reduced, does not authorize a reduction to a point where the rates fail to yield a substantial return over all proper costs of the particular traffic. It cannot because of public policy, fix a "slightly remunerative" rate, or one yielding "slightly in excess of operating expenses", on the theory that the loss of profit to the carrier may be made up in higher rates on the products of the forest, or of the mine. The losses caused by a rate yielding less than a fair return may not be shifted over to other industries to increase their rates beyond what is reasonable.

2. Scope of examination by this Court.

The findings of the Commission that the new rates are non-confiscatory is not binding on the court. The court is under the duty itself to examine the facts

and the law and on its independent judgment decide whether the rate fixed is or is not a legal one.

Ohio Valley Water Company v. Ben Avon Borough, 253 U. S. 287;
Prentis v. Atlantic Coast Line Company, 211 U. S. 210.

The court is called upon by these decisions to examine independently the evidence introduced before the Commission and to make its judgment upon those facts, in exactly the same way that a court of equity passes upon facts presented to it in an ordinary suit. It must find in accordance with the weight of the evidence. In this case the task is not difficult, since the report of the Commission shows not only that the rate is confiscatory, but also the misinterpretation of the law and the error in computation by the Commission which caused the fixing of the confiscatory rate.

3. The evidence of confiscation.

The petition alleges that the rates are confiscatory, and in support of this allegation sets forth the following (R. 11):

The average revenue per car under the new rates, using the highest rates prescribed in the order, and allowing for the increased minimum weight on grapes permitted thereby, will not exceed..	$467.07
The total average operating expenses and taxes per car (with-	

out allowing any profit) will not be less than	470.06	
The loss per car (without allowing any profit) will be not less than	2.99	per car
On the basis of an annual movement of approximately 80,000 cars, the actual loss (without allowing any profit) will be not less than	240,000.00	per year
The loss in revenue resulting from the new rates will be not less than	2,700,000.00	per year

The petition also shows by appropriate allegation what the cost of not less than $470.06 represents (R. 9). It represents an average operating expense per car, exclusive of taxes and rental of joint facilities, of not less than $433.68.

It represents taxes, amounting to 8.39% of $433.68, or ..... 36.38.

(This percentage of tax is derived from Exhibit 204 (R. 458) and represents the ratio which taxes bore to operating expenses for the year 1926 for all the railroads in the western district, including the Illinois Central and five principal railroads in the eastern district.)

Or total costs in excess of ..... $470.06.

These specific allegations are supported by the uncontradicted evidence presented to the Commission.

It is unusual in a rate proceeding involving an interstate rate, that it is possible for the carriers to produce cost records which reflect with reasonable certainty and exactness the actual costs. In this case, however, such a cost study was presented and was accepted by the Commission in its original report as being prepared upon a proper basis. The Commission even went further. It stated (R. 58) that due weight was given to the cost study presented by the carriers. But in making its computations in the original report the Commission made the error of $20.79 per car in computing the costs of the carriers. After the carriers had pointed this out in their petition for rehearing, the Commission, in its Report on Further Consideration, was forced to admit its error (R. 67). Then, and then only, did the Commission attempt to cast doubt upon the carriers' cost study. A reading of the report and a checking of the evidence will show that the Commission utilized the carriers' cost study in arriving at the reduced rate, and that in so doing the Commission made the error of $20.79 per car in its computation as to costs. The criticisms by the Commission of the carriers' cost study made for the first time in the Report on Further Consideration, are not justified by any evidence and are entitled to little consideration by this court. They are obviously made for the purpose of escaping the conclusion which inevitably follows the error of computation made in the original report. For this inevitable conclusion that the rates are con-

fiscatory results from the fact that the "lowest possible lawful rates", originally fixed by the Commission rested upon an error of $20.79 against the carriers; they cannot continue to be the "lowest possible lawful rates" after the error is discovered; they must necessarily now be lower than the lowest possible lawful rates.

4. The revenues to be expected under the new rates.

The Intervener, California Growers' & Shippers' Protective League, filed a verified answer alleging that the average revenue per car under the new rates will be $480 per annum, instead of the $467.07 alleged by the carriers. The Intervener alleges (R. 89) "that said new rates will produce an average revenue, using the highest rates prescribed in the said order and allowing for the increased minimum weight on grapes permitted thereby, to the carriers approximating $480 per car", and again the Intervener alleges (R. 95) "that the evidence adduced before the Commission shows * * * the authorized increase in the carload minimum weight applicable to shipments of grapes from 26,000 pounds to 30,000 pounds will be followed by an increase in the average load of grapes in an amount somewhat in excess of 30,000 pounds per car, and that such increase in the loading will necessarily substantially increase the average revenue per car."

In the first place it is impossible that the new rate, even with an increase in the average load of grapes to an amount in excess of 30,000 pounds per car, will

"necessarily substantially increase the average revenue per car". Intervener forgets that the rates have been reduced. The present average revenue per car is $429.42 as found by the Commission (R. 31). The highest revenue that Intervener even dares to allege is $480.00, a decrease of $9.42 in average revenue per car, instead of the "substantial increase" which Intervener alleges must necessarily follow.

In the second place, while the decreased rates apply to all deciduous fruit traffic,—the increased minimum in car loading applies only to grapes (R. 59).

The question as to what the revenue under the new rates will be, is one of fact to be decided by this court. But it is illuminating to see what the Commission thought on the question of what the average loading would be under the new minimum, in view of the Intervener's allegation.

In its report the Commission says (R. 39):

> "Complainant contends that there has been an increase in the average loading per car, but excluding abnormal years, the loading figures have not changed materially in recent years. * * * Complainant predicts that with an increase in the minimum on grapes to 30,000 pounds, the resultant average load of all deciduous fruits will be increased to something approximating that figure. Whether that result will follow is questionable. It would be necessary that the average loading of grapes be increased to 31,140 pounds to bring the average loading of all deciduous fruits to 30,000 pounds. If the average loading of all fruits remained the same and grapes were loaded

to the minimum, the average load would become 29,192 pounds."

From this it is a fair inference that,

(1) The Commission considers it questionable (and therefore improbable) that the average load will increase to 30,000 pounds and this is the figure that must be used to arrive at the revenue of $480 per car, which intervener alleges will result.

(2) That the Commission considered 29,192 pounds the proper estimated average load under the new rate. This is the figure petitioners have used to compute the anticipated income and represents an increase of 886 pounds over the present average load per car.

For the purpose of computing the anticipated revenue under the new rates, it is submitted that the basis mentioned by the Commission and used by the carriers, is reasonable and proper.

5. Even using the erroneous figures of Intervener, the new rate is confiscatory.

The Intervener claims a gross revenue of $10.00 per car in excess of the revenues stated in the complaint herein. If its figures were correct (which they are not), the carriers would receive at the maximum $10 per car in excess of their costs. $10 over costs of $470 per car. Even this would not represent profit,

for the reason that rentals would still have to be deducted.

But, assuming that the carriers will receive a profit of $10 per car under the new rate, the profit represents that earned by the carriers for transporting a carload of fruit, of an approximate net weight of 15 tons, 2970 miles (R. 20) eastward across the continent and for returning 2400 miles with the empty car (R. 45), as well as for the further incidental service connected with assembling, re-routing and delivery of freight, the furnishing of expedited service, and the use of expensive and unusual equipment. The average time required in this haul is approximately thirty days. The cost of such a car is $3194. A six per cent return upon the refrigerator car alone for this period of time would be over $15.00. The return of $10.00 is less than 4% on the value of the car while in use, without any return on the roadbed, locomotives or other facilities used in transportation, and even without any allowance for the idle time of the car itself. It is not a substantial profit, but a negligible one and is made so low as to be in violation of the constitutional rights of the carriers.

Even if the average revenue under the new rates were the same as that under the old rates ($489.40 per car) the profit over operating costs would be barely sufficient to pay interest on the value of the car while in use on one trip, and still allows nothing to the carrier for the use of their other facilities.

A more substantial return than this was held to be confiscatory in *Norfolk & Western Railway Company v. West Virginia*, 236 U. S. 605.

6. The Carriers' costs.

What does the record before the Commission show as to the carriers' costs? Figures and statistics were introduced by the carriers to show what the costs of the service actually were.

The most comprehensive of these cost studies consisted of a detailed analysis of the actual operating expenses of the Santa Fe Railroad in the year 1923, covering a typical movement. The Commission comments upon this showing as follows (R. 54):

> "No details are given in the cost study so that a check can be made as to the mechanical or clerical accuracy of the result. The methods employed in reaching the result seem to be satisfactory."

The Commission then discusses the manner in which the various items of expense, such as fuel, wages, switching expense, locomotive repairs, etc., were computed and allocated and states (R. 54):

> "Other items were reasonably apportioned to the grape trains."

The carriers' theory was that by ascertaining the costs per car mile for the movement over the Santa Fe, the costs for the average haul of all deciduous fruits could be very closely approximated by applying

the same costs to the haul on other railroads. Testimony was introduced to show that the costs for the average haul of all deciduous fruits could be very closely approximated by applying the same costs to the haul on other railroads. Testimony was introduced (R. 482) to show that the haul over the single line of the Santa Fe was probably performed at less cost than the hauls over any of the other routes comprising in each case two or more independent lines. This assumption and theory of the carriers were not in any way criticized by the Commission in its original report and this basis is recognized as proper in other decisions of the Commission. One of the steps necessary in computing the cost per mile was to estimate and apply the ratio of empty car to loaded car miles, since in the transportation of deciduous fruits, the empty car haul was very greatly in excess of the average empty car haul for other classes of traffic. The carriers' figures showed that the ratio of westbound empty car mileage to total westbound mileage used was 81.5% (R. 478), and that the percentage of total empty to total loaded car mileage both eastbound and westbound was 67.58%.

The Commission based the new rates upon an allowance for empty car miles bearing a ratio to loaded car miles of 67.58% (R. 54). The Commission in this manner arrived at a cost of the carriers of $414.02 per car without taxes, rental of equipment or joint facilities (R. 55). After the order was made the carriers filed with the Commission a petition for recon-

sideration. One of the grounds urged was that the Commission in fixing the indicated costs at $414.02 a car, exclusive of taxes, had erroneously used 67.58% as the ratio of empty car to loaded car miles, when the proper ratio was 81.5% and that this error caused an under valuing of the costs amounting to $20.79 per car.

In its Report on Further Consideration the Commission admits that its action in substituting the lower percentage was erroneous, stating (R. 66):

> "In their petition defendants question the propriety of the substitution of the figure of 67.58 for 81.5 as the ratio of empty-car to loaded-car mileage. It is true that this suggestion of a reduction of the allowance for the return of empty cars was unwarranted. The two figures are not comparable. The higher figure is the ratio of the westbound empty-car mileage to the total westbound mileage. The substituted figure represents the ratio of total empty-car mileage both eastbound and westbound to the total loaded-car mileage in both directions."

After admitting that it had made an error in the costs amounting to $20.79 per car, the Commission proceeded (R. 67):

> "The carriers state that the effect of the erroneous substitution amounted to $20.79 per car, and that if we had merely changed the percentage of empty car mileage on the Santa Fe, 68.78 to 67.58, the percentage for all the lines engaged in this traffic, the $414.02 found in the opinion would have become $433.68 per car. This may be compared with revenue, at existing rates of $489.59.

> The difference, $55.91, would be available for taxes, rental of equipment or joint facilities, and interest and this difference would not be eliminated by the prescribed reductions, especially if we assume that the increased minimum load would make some increase in the average revenue per car. In other words, even if the cost study were accepted without question, it would indicate that the prescribed rates are slightly above operating expenses, and would confirm the impression obtained from comparisons with other rates that the new rates while probably of less than average profitableness, would still leave the traffic attractive to the carriers."

It also finds (R. 68):

> "On the whole record, we adhere to our former finding that the present rates are unreasonable and we are not convinced that the rates prescribed are below what are necessary to afford complainants the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

When the Commission made its original order it was under the belief that the costs as developed by the carriers' evidence and which it took into consideration, were $20.79 per car less than they actually proved to be. Notwithstanding its recognition of this error of $20.79 per car in estimating the costs, the Commission adhered to its former decision. How the lowest possible lawful rate fixed at the time the order was originally made, and based on the erroneous estimate of costs by the Commission, can still remain the lowest possible lawful rate when it is proved and

admitted that the actual costs are $20.79 per car higher than they were thought to be when the order was originally made, is something of a mystery. The most that the Commission is willing to say in its Report on Further Consideration (R. 67) is that the difference available

> "for taxes, rental of equipment or joint facilities, and interest would not be eliminated by the prescribed reductions, especially if we assume that the increased minimum load would make some increase in the average revenue per car."

And also that (R. 67):

> "* * * even if the cost study were accepted without question, it would indicate that the prescribed rates are slightly above the operating expenses and would confirm the impression obtained from comparisons with other rates that the new rates, while probably of less than average profitableness, would still leave the traffic attractive to the carriers."

The fact that the difference between operating expense and revenue under the present rates would not be eliminated by the prescribed reductions, is not a finding that the rates are lawful or non-confiscatory. A finding that the prescribed rates are slightly above "operating expenses" is in effect a finding that the rates are confiscatory. The term "operating expenses" as is indicated by the context, does not include taxes or rentals. A rate slightly above operating expenses certainly is not a compensatory rate.

It may be urged that the Commission did not fix the new rates on the basis of the cost study of the carriers. However, it cannot be denied that it took the figures into consideration for it said in its original report (R. 58):

> "Considering the relative rates on and earnings of the deciduous-fruit traffic in the light of the condition of the industry and of the service performed by the carriers and giving due weight to the cost study presented by defendants, we are of the view that the present rates are in excess of the lowest possible lawful rates as herein defined."

When it found that it had made an error of $20.79 per car, the Commission, in an endeavor to escape the inevitable conclusion that the rate fixed by it was in error to the same extent, said (R. 68): "While consideration was given to the cost study submitted by defendants, it was not a controlling factor in our decision". Whether it was the controlling factor or not, it was admittedly taken into consideration in arriving at the new rate. Without the use of the study the Commission had no evidence before it upon which to base its finding that the new rates are the "lowest possible lawful rates compatible with the maintenance of adequate transportation service."

In its Report on Further Consideration, the Commission, forced to admit its error in computation, attempted to discredit the carriers' cost study. In its original report, it had specifically approved the "methods employed in reaching the results" (R. 54).

The Commission, in its Report on Further Consideration, states (R. 67) that no details were given and consequently no check could be made as to the mechanical or clerical accuracy of the cost study. The record shows that the cost study was presented by a witness who was subjected to cross-examination (R. 483). If there was any doubt about the accuracy of the computations, it was the duty of the Commission and of the complainant to demonstrate that fact when the testimony was being introduced. Under the law (Sec. 20 (5) Interstate Commerce Act) the Commission has ample power to investigate the carriers' accounts, and thus to develop any errors that might exist in their cost study.

The Commission states that "while consideration was given to the cost study submitted by defendants, it was not a controlling factor in our decision. Numerous other pertinent matters of record were given proper weight" (R. 68). The carriers' cost study was the only direct and persuasive evidence as to costs and afforded the best possible evidence and in fact the only substantial evidence as to what was a lawful rate. The rate comparisons introduced by the complainant, the inadequacy of which has already been commented upon, have no evidentiary value to determine what is the lowest possible lawful rate compatible with the maintenance of adequate transportation.

As this court is called upon to render an independent judgment on the facts and the law as to confisca-

tion, it will be called upon to examine the record, including the carriers' cost study and the complainant's rate comparisons and decide whether the rate fixed by the Commission is supported by a preponderance of the evidence.

An interesting case upon the value of evidence as bearing on the issue of confiscation is *Northern Pacific Railway Company v. Department of Public Works of the State of Washington,* 268 U. S. 39, 43. Here the Department of Public Works of Washington established a rate on saw logs in carload lots. In a court proceeding to annul the decree the two principal carriers "presented evidence tending to show * * * that the rates did not defray fully the operating cost of the traffic and its proportion of the taxes payable". In discussing this case, Mr. Justice Brandeis said in commenting upon the cost data:

> "This evidence was in character persuasive. It was fairly specific, direct, and comprehensive. If the facts warranted, the shippers and the public officials might, of course, have shown by evidence of similar character that the carriers' evidence was inherently untrustworthy; or it might have been overcome by more persuasive evidence to the contrary. Little attempt was made to show that any testimony introduced by the carriers was inherently untrustworthy. Little conflict with the evidence of the carriers was developed by the evidence as to specific facts introduced for the shippers and the public. Apparently necessary inferences from specific facts established by the carriers were not explained away. The Department's findings concerning operating costs

rested largely upon deductions from data found in published reports of the carriers and in their exhibits filed in this case. Instead of attempting to show by evidence, reasonably specific and direct, what the actual operating cost of this traffic was to the several carriers, the Department created a composite figure representing the weighted average operating cost per 1,000 gross ton miles of all revenue freight carried on the four systems, and made that figure a basis for estimating the operating cost of the log traffic in Washington. This was clearly erroneous."

The same comment might be made on the evidence in this case. The cost evidence introduced by the carriers was in character persuasive. It was fairly specific and direct and comprehensive. If the facts warranted, the shippers and public officials might have shown by evidence of similar character that the carriers' evidence was inherently untrustworthy, or it might have been overcome by more persuasive evidence to the contrary.

From the face of the report of the Commission, it appears:

(a) That the methods employed in determining the carriers' costs were proper;

(b) That the Commission made an error of $20.79 per car in estimating the costs of the carriers, and that it had this erroneous figure before it when it fixed the new rate;

(c) That it is of the opinion that the new rates "are slightly above operating expenses";

(d) That in the opinion of the Commission the new rates "while probably of less than average profitableness, would still leave the traffic attractive to the carriers."

It is submitted that the report of the Commission and the record show conclusively that the rate fixed is confiscatory, and that it fixed a rate based upon an error in computation necessarily making the new rate at least $20.79 lower than it should have been had the Commission not made its error.

SUMMARY.

To recapitulate the contention of the carriers, it is believed that the following positions have been demonstrated:

1. That the Interstate Commerce Commission, in fixing the rate in question, relied upon a supposed mandate to lower existing rates on agricultural products believed to be contained in the Hoch-Smith Resolution.

This fact appears from the face of the Commission's Reports and Orders. It is established:

(a) by the evidence on which the Commission relied in drawing its conclusions;

(b) by the history of the proceeding itself, involving a reversal of a position taken by the

Commission only a few months before the present proceeding was instituted;

(c) by the Commission's definition of the issue in the case,—whether the rate assailed "approaches the lowest limit or level of the zone of reasonableness";

(d) by the concurring and dissenting opinions;

(e) by the emphasis laid upon the depressed condition of the deciduous fruit interests;

(f) by the Report and Order on Further Consideration, which finds that the Commission was "not convinced that the rates prescribed are below * * * the lowest possible lawful rates compatible with the maintenance of an adequate transportation service";

2. That even though the order "may have been couched in a form which would cause it, superficially considered" (219 U. S. at p. 443), to appear to involve the determination of the unreasonableness of an existing rate, and the reasonableness of the new rate, in fact it was an order fixing the lowest possible rate conceived to be demanded by the Joint Resolution of Congress referred to.

3. That the Hoch-Smith Resolution was improperly construed by the Commission as requiring it to seek the lowest limit at which a lawful rate could be fixed in a proceeding instituted by shippers for the purpose of having a particular rate reduced as unreasonable.

In fact, the Hoch-Smith Resolution was intended by Congress only as a direction to the Commission to examine the entire rate structure of the country with a view of readjusting rates as an entirety and was intended to have no application to proceedings before the Commission initiated by complaint.

This construction is borne out (a) by the form of the legislative declaration—a Joint Resolution; (b) by its title; (c) by its legislative history; (d) by the language of the Resolution; (e) by the administrative action of the Commission itself in initiating a general proceeding to investigate the entire rate structure; and (f) by former rulings of the Commission itself.

4. The result of construing the Resolution in the manner in which it was construed and of applying it to proceedings brought on complaint to reduce rates would be disastrous. The race for priorities would result in the most active competition in securing reductions of rates inherently reasonable, because of financial difficulties for which the rates are not shown to be responsible.

5. That the Commission in making the order complained of misconstrued the Hoch-Smith Resolution in other particulars than in respect to its applicability to the sort of proceeding here involved.

(a) It interpreted it as requiring an existing rate to be reduced though not inherently unreasonable;

(b) It interpreted the Resolution as justifying a reduction to a lower limit though the carriers were not making a fair return, and thus treated it in effect as repealing Section 15a of the Interstate Commerce Act;

(c) It misconstrued the expression "freedom of movement" by introducing into words that deal only with transportation matters a meaning involving economic and business problems wholly independent of transportation or the movement of goods;

(d) It viewed the Resolution as requiring it to reduce an established rate complained of, if the shippers showed they labored under financial distress, unless the carriers proved it to be the lowest possible lawful rate;

(e) It considered that its duty under Congressional mandate was to lower an established rate in favor of depressed agricultural interests upon "impressions" and "indications" merely;

(f) It yielded to an assumed command which does not exist in the Resolution to fix the rate at a point where the profit was only "slightly" above operating expenses, and that returned "some" profit, because it believed the lowest possible rate ought to be so fixed under the terms of the Resolution.

6. The construction given by the Commission to the Resolution raises grave question of its constitutionality. The Commission's construction implies that

the Resolution authorizes a subsidy to a depressed industry at the expense of carriers and at the expense of other shippers. These serious questions, involving the whole matter of a federal commercial policy may be avoided by construing the Resolution as requiring no other or different standard of rate fixing than the Interstate Commerce Act and the Transportation Act of 1920.

7. That the rate fixed is confiscatory, because it does not give the carrier a substantial return over costs properly allocated to the service, but only "some" return or a "slight profit".

8. That the rate was intentionally fixed below the point where there would be a substantial return, because the Commission regarded it as a duty imposed by the Resolution to reduce a rate not unreasonable under the tests adopted and applied in general in order to aid the deciduous fruit growers of California.

9. That the Commission after fixing the lowest possible lawful rate, as they conceived it, basing their action in large part upon a cost study, upon a rehearing and reconsideration left the rate so fixed undisturbed, though there was a conceded clerical error of more than $20 per car. In so doing, they necessarily fixed a rate lower than the lowest possible lawful rate.

10. That the finding of the Commission that the new rate is non-confiscatory is not binding on the

court since the carriers' petition raises the point and an issue was made on it before the lower court.

11. That the evidence before the Commission shows that the rate is confiscatory, and the fact may be determined by the Court from the Reports and Orders of the Commission.

CONCLUSION.

The present case is not one depending upon conflicting testimony or disputed questions of fact. The questions involved are simple and are legal rather than factual. Definite legal propositions are to be passed upon. The applicability of a Resolution made by Congress, the construction of that Resolution, the question of the duty of the Interstate Commerce Commission to apply the rules established by the Acts of Congress respecting transportation and commerce, the confiscatory character of the rate fixed under an erroneous reading of the order of the legislative department of the United States, present those "salient circumstances" which require the court to review the orders of the Commission mentioned by the court in *Illinois Central Ry. Co. v. Interstate Commerce Commission,* 206 U. S. at p. 455.

It is submitted that Congress by a mere Joint Resolution did not make, or intend to effect a fundamental and revolutionary change in rate making policy, or upset the principles and plan of railroad regu-

lation that had gradually and painfully developed over more than forty years of experience, trial and error, and which had culminated in the Transportation Act of 1920. Rather does it seem clear that the Resolution is a mere direction to the ministerial officers of the Government to enforce and carry out the provisions of the then existing law so as to give full force and effect to that complete and affirmative policy of regulation prescribed by the Interstate Commerce Act as it has developed through the successive amendments made thereto over a long period of time.

The judgment of the lower court should be reversed and the order made, and the rate established, by the Commission annulled.

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Receipt of a copy of the foregoing Statement is hereby acknowledged on this.....day of January, 1929.

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Attorneys for Appellee California Growers' and Shippers' Protective League.

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1929.

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